No. 14-449

Title:	Kansas, Petitioner
	v.
	Jonathan D. Carr
Docketed:	October 20, 2014
Lower Ct:	Supreme Court of Kansas
Case Nos.:	(90,198)
Decision Date:	July 25, 2014

Questions Presented

—Date—	——Proceedings and Orders----------
Oct 16 2014	Petition for a writ of certiorari filed. (Response due November 19, 2014)
Oct 16 2014	Appendix of Kansas (2-volumes) filed.
Dec 10 2014	DISTRIBUTED for Conference of January 9, 2015.
Jan 6 2015	Response Requested . (Due February 5, 2015)
Feb 4 2015	Brief of respondent Jonathan D. Carr in opposition filed.
Feb 4 2015	Motion for leave to proceed in forma pauperis filed by respondent Jonathan D. Carr.
Feb 10 2015	Reply of petitioner Kansas filed.
Feb 25 2015	DISTRIBUTED for Conference of March 20, 2015.
Mar 23 2015	DISTRIBUTED for Conference of March 27, 2015.
Mar 30 2015	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Mar 30 2015	Petition GRANTED limited to Questions 1 and 3 presented by the petition. The motion of respondent for leave to proceed in forma pauperis and the petition for a writ of certiorari in No. 14-450 are granted limited to Questions 1 and 3 presented by the petition. The cases are consolidated and a total of one hour is allotted for oral argument.
Apr 13 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioners. VIDED
Apr 21 2015	The Clerk has approved use of the deferred joint appendix method, and the joint appendix is to be filed on or before August 10, 2015. VIDED
Apr 21 2015	The time to file petitioner's brief on the merits is extended to and including June 8, 2015. VIDED
Apr 21 2015	The time to file respondents' briefs on the merits is extended to and including August 3, 2015. VIDED
Jun 5 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent. VIDED.
Jun 8 2015	Brief of petitioner Kansas filed (Reprinted). VIDED.
Jun 11 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent. VIDED
Jun 12 2015	Brief amici curiae of Criminal Justice Legal Foundation, et al. filed. VIDED.

Jun 15 2015	Brief amicus curiae of the United States filed. VIDED.
Jun 19 2015	Motion for scheduling of argument and for divided argument filed by respondents in Nos. 14-449, 14-450 & 14-452. VIDED.
Jun 23 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Jun 29 2015	Motion for scheduling of argument and for divided argument filed by respondents in Nos. 14-449, 14-450 & 14-452 GRANTED. VIDED.
Jun 29 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED
Jun 29 2015	Upon consideration of the joint motion of respondents for scheduling of argument and for divided argument, and of the motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument in Nos. 14-449 and 14-450, the following allocation of oral argument time is adopted. A total of one hour is allocated for oral argument in No. 14-452, and on Question 1 in Nos. 14-449 and 14-450, to be divided as follows: 30 minutes for petitioner, 20 minutes for respondents Jonathan D. Carr and Sidney J. Gleason, and 10 minutes for respondent Reginald D. Carr. A total of one hour is allocated for oral argument on Question 2 in Nos. 14-449 and 14-450, to be divided as follows: 20 minutes for petitioner, 10 minutes for the Solicitor General, 20 minutes for respondent Reginald D. Carr, and 10 minutes for respondent Jonathan D. Carr. VIDED
Jul 29 2015	SET FOR ARGUMENT on Wednesday, October 7, 2015.
Aug 3 2015	Brief of respondent Jonathan D. Carr filed. (Reprinted)
Aug 7 2015	CIRCULATED.
Aug 10 2015	Brief amicus curiae of The Promise of Justice Initiative filed. VIOED. (Distributed)
Aug 12 2015	Record requested from the Supreme Court of Kansas.
Aug 13 2015	Joint appendix filed (2 volumes). (Statement of costs filed.) VIDED. (Distributed)
Sep 2 2015	Reply of petitioner Kansas (on the severance question) filed. VIDED. (Distributed)
Sep 24 2015	Record received from the Supreme Court of Kansas, (2 Boxes) part of the record is electronic.
Oct 1 2015	Letter from counsel for petitioner filed. (Distributed)
Oct 5 2015	Joint letter from counsel for respondents in 14-449 & 14-450 filed. (Distributed)
Oct 7 2015	Argued (Burden Question). For petitioner: Derek L. Schmidt, Attorney General, Topeka, Kan. For respondent in 14-452 & 14-449: Jeffrey T. Green, Washington, D. C. For respondent in 14-450: Neal K. Katyal, Washington, D. C. VIDED
Oct 7 2015	Argued (Severance Question). For petitioner: Stephen R. McAllister, Solicitor General, Topeka, Kan.; and Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent in 14-450: Frederick Liu, Washington, D. C. For respondent in 14-449: Jeffrey T. Green, Washington, D. C. VIDED

14-449

No. _____

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR WRIT OF CERTIORARI AND VOLUME 1 OF APPENDIX

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. McALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
stevermac@fastmail.fm
Counsel for Petitioner

October 2014

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

2. Whether the Confrontation Clause, as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), applies to the "selection" phase of capital *sentencing* proceedings, as the Kansas Supreme Court held here, *i.e.*, after a defendant has been convicted of capital murder and proof of eligibility for the death penalty has been presented in the guilt phase subject to full confrontation, or does *not* apply to such purely sentencing evidence, as at least three Circuits have held?

3. Whether the trial court's decision not to sever the sentencing phase of the co-defendant brothers' trial here—a decision that comports with the traditional approach preferring joinder in circumstances like this—violated an Eighth Amendment right to an "individualized sentencing" determination and was not harmless in any event?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully petitions for a Writ of Certiorari to review the judgment of the Kansas Supreme Court.

OPINION BELOW

The decision of the Kansas Supreme Court is reported, *State v. Carr*, 329 P.3d 1195 (Kan. 2014), and is reproduced as Appendix A.

JURISDICTION

The Kansas Supreme Court decided this case July 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..." U.S. Const. amend VI.

The Eighth Amendment to the United States Constitution provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, " nor shall any State deprive any person of life, liberty, or property without due process of law . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. The Facts

Jonathan Carr, Jr., and his brother, Reginald Carr, were jointly charged, tried, convicted, and sentenced for crimes committed in a series of three incidents in December 2000 in Wichita, Kansas.

In the first incident, on December 7, 2000, the Carr brothers carjacked Andrew Schreiber and drove to various ATMs, forcing Schreiber at gunpoint to withdraw money from his bank account. They ultimately abandoned Schreiber in a rural area after taking his watch, striking him in the head with a gun, and shooting out a tire on his vehicle. App. 95-98.

Four days later, the Carr brothers followed Linda Ann Walenta to her home. As she pulled into her driveway, one of the brothers approached her vehicle. When he pointed a gun through the driver's side window, Walenta attempted to reverse her vehicle and was shot. Although she survived for a few days in the hospital, Walenta died from the shooting. App. 99-101.

The third and utterly depraved incident began on December 14, 2000, at a home shared by three young men, Aaron S., Brad H., and Jason B. Two women, Holly G. and Heather M., were also at the home that night. App. 101.

Shortly after the occupants of the house went to bed, the Carr brothers, armed with guns, forced their way inside. They rounded up the occupants, gathered them into one bedroom, and demanded money. When the victims said they had no cash, the Carrs demanded ATM cards. App. 101-102. The Carrs also ordered the

victims to remove their clothes and forced all five of them into a closet, telling them to sit down and be quiet. App. 102.

The brothers then removed the two women from the closet and forced them to perform oral sex on each other and penetrate each other with their fingers, as the brothers watched and gave instructions. Next, they brought the male victims out of the closet one at a time and ordered each to have sexual intercourse with Holly G. The Carrs threatened to shoot the men if they did not perform. When one victim said he would not do it, he was struck in the back of the head with a hard object. App. 103-04.

After these acts, the Carrs returned Holly G. to the closet and brought out Heather M. They then ordered each of the men to have sexual intercourse with her. App. 104.

After these numerous coerced sex acts, Reginald Carr took Brad H. from the house and drove him to several ATMs to withdraw money. App. 104, 127. While they were gone, Jonathan ordered Holly G. out of the closet and raped her. He then took Heather M. out, and proceeded to rape or attempt to rape her. App. 105.

Brad H. and Reginald returned after about 30 minutes, and Reginald then took Jason B. to two ATMs to withdraw money. Upon their return, Reginald took Holly G. to several ATMs to withdraw money. Finally, Reginald returned with Holly G. and took Aaron S. to withdraw money. App. 105-07, 128-29.

When Reginald and Aaron S. returned, Reginald again raped Holly G. and forced her to perform oral

sex. Meanwhile, Jonathan was raping Heather. Jonathan then raped Holly G. again. App. 107-08.

When the brothers finished raping the women, they forced the men into the trunk of Aaron S.'s car, put Heather M. in the back seat of the car, and put Holly G. in the passenger seat of Jason B.'s truck. App. 109. Jonathan drove Aaron S.'s car, followed by Reginald driving Jason B.'s truck. App. 109.

The Carrs drove to a soccer field and ordered all of the victims out, forcing them to kneel in a line. The Carrs then shot each of the five victims in the back of the head, and drove away. App. 109-10, 123-24.

Miraculously, Holly G. survived. The bullet fired at the back of her head fractured her skull, but did not enter her brain, apparently because it was deflected by a plastic hairclip she was wearing. App. 110, 112. The impact stunned her, but she could hear the Carrs talking and heard them drive away. App. 110.

After the Carrs left, Holly G. got up and spotted a house in the distance. App. 110. Naked and barefoot, she ran more than a mile through snow and over fences to reach the house. App. 110.

Holly G. pounded on the door and awoke the homeowners, who took her inside and called 911. App. 110-11. Holly G. was treated for her injuries and eventually recovered. The other four victims, however, died. App. 123-24. Holly G. provided police with details of these heinous crimes and testified against the Carrs at trial.

The police quickly apprehended Reginald Carr. When he was arrested, Reginald had a gas card bearing

Jason B.'s name, a watch that belonged to Heather M., and $996. Inside the apartment where they arrested Reginald, police found numerous additional items belonging to the four murder victims and Holly G. App. 117-18.

Meanwhile, Jonathan Carr had gone to a friend's apartment. When the friend and her mother saw news footage of Reginald Carr's arrest and learned that police were looking for another individual, they grew suspicious of Jonathan and called police. App. 118-20. Police arrived and apprehended Jonathan. Like Reginald, Jonathan had property of the victims, including the engagement ring Jason B. had purchased for, but not yet given to, Holly G. App. 121.

B. The Trial and Penalty Proceedings

The Carrs were jointly tried and convicted of numerous criminal counts arising from their crime spree, including the felony murder of Walenta, and four capital murders (of Aaron S., Brad H., Jason B., and Heather M.). App. 91-93. In the capital sentencing proceeding that followed their convictions, both Reginald and Jonathan were sentenced to death for the four capital murders. They each also received a life sentence for the Walenta murder and additional terms of imprisonment for their numerous non-capital convictions. App. 93.

C. The Kansas Supreme Court's Decision

The Kansas Supreme Court affirmed 25 of Jonathan Carr's 43 convictions, including one count of capital murder for the quadruple murder in the soccer field. App. 26. But the court reversed his death sentence, finding three constitutional errors in the penalty

proceedings. The court held (1) Reginald's Eighth Amendment right to an individualized sentencing determination was violated by the trial court's decision not to sever the brothers' penalty phase proceedings, App. 45, 470-79; (2) his Sixth Amendment right to confrontation was violated by admission of hearsay in the sentencing phase, App. 46, 483-90;[1] and (3) the trial court's failure to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt violated the Eighth Amendment. App. 47, 511-12.[2] One justice dissented from the majority's finding of constitutional error in the jury instructions, stating that the majority's opinion "defies the United States Supreme Court's established Eighth Amendment jurisprudence." App. 63-65, 547-49. Another justice dissented from all of the majority's constitutional rulings and would have affirmed Jonathan Carr's death sentence. App. 65-66, 549-63.

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[1] In ruling on these first two issues, the Kansas Supreme Court merely referenced its opinion in the companion case, *State v. Reginald Carr*, 331 P.3d 544 (2014), reproduced here as Appendix B. Reginald Carr's case is the subject of a Petition for Writ of Certiorari that Kansas has filed simultaneously with this petition.

[2] In ruling on this issue, the Kansas Supreme Court referenced its opinion in *State v. Gleason*, 329 P.3d 1102 (2014), released only one week earlier, to explain its reasoning. That case is the subject of a Petition for Writ of Certiorari that Kansas has filed simultaneously with this petition.

REASONS FOR GRANTING THE WRIT

This case is of perhaps unique significance to Kansas, because (along with the companion case, *State v. Reginald Carr*, 331 P.3d 544 (2014)) it involves one of the most heinous and notorious crime sprees in the history of Kansas. Although Kansas has endured other notorious murders, such as the murder of the Clutter family, and the murders committed by the Wichita serial killer BTK, the monstrosity of the Carrs' crimes is in many respects unparalleled. The sheer depravity of the brothers' crimes has elevated this case to a level of singular importance in the eyes of many Kansans.

But putting its infamous and notorious nature aside, this case presents the Court with three important federal constitutional questions – all matters of first impression for the Court – that merit the Court's attention because the resolution of these questions carries significant consequences for state and federal capital punishment systems.

Certiorari should be granted on the first question presented because the Kansas Supreme Court's holding (1) conflicts with the decisions of other state courts of last resort and calls into question the law of other states; (2) misinterprets this Court's precedents to reach a conclusion the Court has never endorsed or suggested; (3) contributes to a "crazy quilt" of federal constitutional death penalty jurisprudence; and (4) invalidates the sentences imposed on two-thirds of those currently under sentence of death in Kansas.

Certiorari should be granted on the second question presented because the Kansas Supreme Court's decision creates a split of authority between a state

court of last resort and at least three federal Circuits on an important and recurring issue of federal constitutional law.

Certiorari should be granted on the third question because it presents an important issue for the conduct of capital penalty proceedings that this Court has not previously addressed, and the Kansas Supreme Court's holding (1) effectively abolishes joint death penalty proceedings, and (2) misconstrues this Court's harmless error standard.

First Question Presented

I. The Kansas Supreme Court's holding that the failure to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt violated the Eighth Amendment conflicts with the decisions of other state courts of last resort and the current law of several states, and possibly the law and procedures governing federal and U.S. military capital cases.

Relying on its decision in *State v. Gleason*, 329 P.3d 1102 (2014), the Kansas Supreme Court ruled here that the trial court's failure to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt was constitutional error. App. 47, 511-12.[3] In *Gleason,* the court held that

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[3] As noted in footnote 2, Kansas has petitioned this Court for a Writ of Certiorari in the *Gleason* case, raising this same issue. To

because "the instructions repeatedly emphasized the State's burden to prove the existence of aggravating circumstances beyond a reasonable doubt and to prove beyond a reasonable doubt that the death penalty should be imposed," but "never informed or explained to the jury that no particular burden of proof applied to mitigating circumstances," the Eighth Amendment was violated. 329 P.3d at 1148.

The Court explained its reasoning as follows: "[the] jury was left to speculate as to the correct burden of proof for mitigating circumstances, and reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt. Thus, jurors may have been prevented from giving meaningful effect or a reasoned moral response to [the defendant's] mitigating evidence, implicating [the defendant's] right to individualized sentencing under the Eighth Amendment." *Id.*

In contrast to the Kansas Supreme Court's decision here, several states have rejected the proposition that the Eighth Amendment requires affirmative instructions that mitigating circumstances need not be proven beyond a reasonable doubt. These jurisdictions include at least California, Delaware, Indiana, Louisiana, and Texas. On the other hand, some states affirmatively instruct capital juries on a burden of proof with regard to mitigating circumstances, although such instructions do not necessarily take the

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the extent Kansas' arguments in this Petition are not as extensive as in *Gleason,* Kansas incorporates by reference its complete argument from the *Gleason* Petition.

form mandated by the Kansas Supreme Court in this case, and it is not clear that any of these jurisdictions give such instructions as anything other than a matter of state or federal statute or practice. There also appear to be a number of jurisdictions that simply do not address the burden of proof (or lack thereof) for mitigating circumstances in any reported decision, by statute, or through their pattern jury instructions.

No decision of which Kansas is aware, other than the one for which Kansas is seeking review here and its companion cases, mandates such instructions as an Eighth Amendment requirement.

A. The Kansas Supreme Court's decision clearly conflicts with the decisions of courts in several states.

A number of state supreme courts have addressed the question presented here and soundly rejected the Eighth Amendment argument embraced by the Kansas Supreme Court. California, for example, has held "a trial court is not required to instruct the jury that mitigating evidence need not be proved beyond a reasonable doubt." *People v. Souza*, 277 P.3d 118 (Cal. 2012) (quoting *People v. Avila*, 208 P.3d 634, 670 (2009)); *see also People v. Welch*, 976 P.2d 754, 797 (Cal. 1999). Indeed, in *Welch*, the California Supreme Court rejected the very rationale the Kansas Supreme Court relied on in this case – that because the instructions repeatedly emphasized the State's burden of proof beyond a reasonable doubt, the absence of any instruction on the defendant's burden of proof regarding mitigating circumstances may have led the jury to apply the beyond a reasonable doubt standard to the mitigating circumstances and thus prevented the

jury from "giving meaningful effect or a reasoned moral response" to mitigating evidence. App. 512. The *Welch* court arrived at the exact opposite conclusion, holding "because the trial court instructed specifically that the reasonable doubt standard applied (partially erroneously) to aggravating factors, and mentioned nothing about mitigating factors, the reasonable juror would infer that no such reasonable doubt standard applied to mitigating factors." 976 P.2d at 797.

Likewise, in *Dawson v. State*, 637 A.2d 57, 64-65 (Del. 1994), the Delaware Supreme Court held that jury instructions that included a beyond a reasonable doubt standard for aggravating circumstances but were silent with respect to the burden for mitigating circumstances were not ambiguous and did not preclude the jury from considering any mitigating circumstances.

The Indiana Supreme Court rendered a similar decision in *Matheney v. State*, 688 N.E.2d 883, 902 (Ind. 1997), rejecting the proposition that a jury might mistakenly assume that a beyond a reasonable doubt standard applies to mitigating circumstances in that context "[w]ithout something specific in the given instructions which would clearly lead a jury to such a misunderstanding." 688 N.E.2d at 902.

Louisiana also has rejected the Kansas Supreme Court's position. Like Kansas, Louisiana's capital sentencing procedure "does not establish any presumptions or burdens of proof with respect to mitigating circumstances." *State v. Jones*, 474 So.2d 919, 932 (La. 1985). In *Jones*, the defendant argued that because "the judge emphasized the reasonable doubt standard ... in the sentencing phase with respect

to aggravating circumstances, but was silent as to the standard of proof for mitigating circumstances," the jury was misled into believing the beyond a reasonable doubt standard applied to mitigating circumstances. 474 So.2d at 932. The Louisiana Supreme Court disagreed, finding no error in the instructions. 474 So.2d at 932.

Finally, in *Green v. State*, 934 S.W.2d 92 (Tex.Crim.App. 1996), the Texas Court of Criminal appeals faced a similar question. The defendant in *Green* argued that the articulation of the beyond a reasonable doubt standard with respect to the issues of his intent to kill and continued dangerousness, coupled with the absence of any burden of proof instruction regarding mitigation, confused the jury and denied him a fair trial. 934 S.W.2d at108. The Texas Court of Criminal Appeals disagreed and found no error. 934 S.W.2d at 107-08.

1. **Some jurisdictions require a burden of proof instruction regarding mitigating circumstances, but not a uniform instruction and not as a requirement of the Eighth Amendment.**

Some states do give jury instructions regarding a burden of proof for mitigating circumstances, although these jurisdictions vary in at least two ways. Some give an instruction like the one the Kansas Supreme Court held is constitutionally required, *i.e.*, an affirmative directive that mitigating circumstances need not be proven beyond a reasonable doubt. Others, however, give an instruction that mitigating circumstances must be proven by a preponderance of the evidence, but no

instruction about not having to prove them beyond a reasonable doubt. It appears that the burden of proof instructions in these jurisdictions are given as a matter of state law or practice, or in the case of the federal government, pursuant to statutory command, not as a perceived requirement of the Eighth Amendment.

a. Juries instructed that proof beyond a reasonable doubt is not required.

Florida's standard jury instructions include the language, "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence ...." Fla. Std. Jury Instr. (Crim.) § 921.141(6). Case law reiterates this, but without explaining a basis for the instruction. *See Campbell v. State*, 571 So.2d 415, 419-20 (Fla. 1990). Likewise, Mississippi and North Carolina provide similar instructions. *See Knox v. State*, 901 So.2d 1257, 1270 (Miss. 2005); *State v. Holden*, 488 S.E.2d 514, 532 (N.C. 1997). The primary purpose of these instructions appears to be simply to clarify the "preponderance of the evidence" standard that these states place on defendants to establish mitigating circumstances – a burden, notably, that is not present under Kansas law. *Gleason*, 329 P.3d at 1147; *Kansas v. Marsh*, 548 U.S. 163, 173 (2006)

Arkansas, Oklahoma, South Carolina, and South Dakota, like Kansas, place no particular burden of proof on mitigating circumstances. *Thessing v. State*, 230 S.W.3d 526, 542-43 (Ark. 2006); *Postelle v. State*, 267 P.3d 114, 144 n.29 (Okla.Crim.App. 2011); *State v. Hicks*, 499 S.E.2d 209, 217-18 (S.C. 1998); *State v.*

Rhines, 548 N.W.2d 415, 437 (S.D. 1996). Nevertheless, these states affirmatively instruct capital sentencing juries that mitigating circumstances need not be proven beyond a reasonable doubt. *Thessing*, 230 S.W.3d at 542-43; *Postelle*, 267 P.3d at 144 n.29; *Hicks*, 499 S.E.2d at 217-18. But, again, none of them appears to do so because there is any case law in their jurisdiction holding that the Eighth Amendment requires such an instruction.

b. Juries instructed only on proof by a preponderance standard.

Some states impose a preponderance of the evidence standard on mitigating evidence and instruct juries to that extent and no more. *See e.g.* Ariz. Revised Jury Instructions-Crim. Capital Case 2.6 ("The defendant bears the burden of proving the existence of any mitigating circumstance that the defendant offers by a preponderance of the evidence."); *State v. Addison*, 87 A.3d 1, 173-75 (N.H. 2013); *Eaton v. State*, 192 P.3d 36, 115 (Wyo. 2008); *Commonwealth v. Williams*, 732 A.2d 1167, 1187 (Pa. 1999). This is also the rule in non-military, federal death penalty cases. *See* 18 U.S.C. § 3593(c) ("The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the evidence of such a factor is established by a preponderance of the information."); *see also* Tenth Circuit Pattern Crim. Jury Instr. 3.10 *Mitigating Factors*; Eighth Circuit Model Crim. Jury Instr. 12.02 *Burden of Proof*. These jurisdictions do not appear to affirmatively instruct that mitigating circumstances need not be proven beyond a reasonable doubt.

c. Juries explicitly instructed that there is no burden of proof.

At least a few states, including Ohio, Tennessee and Washington, appear to instruct the jury only that the defendant has no burden of proof with regard to mitigating circumstances. *See, e.g.*, Ohio Jury Instructions: Chapter CR 503.011 *Aggravated murder; death penalty – sentencing phase, Section 1 and Section 4* ("The defendant does not have any burden of proof."); 7 Tenn. Prac. Pattern Jury Instr. T.P.I. – Crim. 7.04(a) ("The defendant does not have the burden of proving a mitigating circumstance."); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 31.05 *Burden of Proof—Presumption of Leniency—Reasonable Doubt (Capital Cases)* ("The defendant does not have to prove the existence of any mitigating circumstances or the sufficiency of any mitigating circumstances.").

2. Some jurisdictions do not appear to address the burden of proof for mitigation at all.

A number of jurisdictions do not appear to have either pattern instructions or available decisions that address whether any burden of proof instruction is to be given regarding mitigating circumstances. Some states, like Kansas, impose a burden of production but do not impose any particular burden of proof on mitigating circumstances. *See e.g. State v. Johnson,* 284 S.W.3d 561, 587 n.19 (Mo. 2009); *Jiminez v. State,* 918 P.2d 687, 696 (Nev. 1996); *Mickens v. Commonwealth*, 478 S.E.2d 302, 305 (Va. 1996); *State v. Smith*, 863 P.2d 1000, 1011 (Mont. 1993); *State v. Hoffman*, 851 P.2d 934, 943 (Idaho 1993). No decisions or statutes or pattern instructions in these states indicate that any

affirmative instruction must be given. Accordingly, these states do not affirmatively instruct that mitigating circumstances need not be proven beyond a reasonable doubt, nor do they declare that such circumstances must be proven by a preponderance of the evidence.

Likewise, the United States Military capital sentencing procedures make no provision for a burden of proof instruction regarding mitigating circumstances. Rule of Court Martial 1004 is the relevant rule, and it does not put a burden of proof on mitigating circumstances, unlike the federal statute (18 U.S.C. § 3593) for federal capital cases generally. *See, e.g.*, RCM 1004(b)(3) *Evidence in extenuation and mitigation*.

For these jurisdictions, the Kansas Supreme Court's holding calls into question their existing capital sentences. The Kansas Supreme Court decision certainly can be used as authority to attack the constitutionality of the existing procedures of these jurisdictions on Eighth Amendment grounds.

Thus, granting review of the first question presented here would allow the Court both to resolve the explicit split of authority created by the Kansas Supreme Court's decision and bring clarity to the constitutionality of the existing procedures utilized in a number of death penalty jurisdictions that currently do not give burden of proof instructions regarding mitigating circumstances.

B. The Kansas Supreme Court misinterpreted this Court's precedent to reach a conclusion the Court has never endorsed nor suggested.

This Court has never held or suggested that the Eighth Amendment requires states to assign a burden of proof for mitigating factors. *Blue v. Thaler*, 665 F.3d 647, 668 (5th Cir. 2011) ("No Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof."). Certainly, the Court has never held or suggested that the Eighth Amendment requires capital sentencing juries to be instructed explicitly and affirmatively that mitigating circumstances need *not* be proven beyond a reasonable doubt. The Court's decisions, instead, strongly suggest that no such instruction is constitutionally required.

This Court has held it is constitutionally permissible to place a burden upon a criminal defendant in death penalty proceedings to prove the existence of mitigating circumstances. *Walton v. Arizona*, 497 U.S. 639, 650-51 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). In *Walton*, the Court said that "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances," there is no constitutional bar to placing upon a defendant the burden of proving mitigating circumstances sufficiently substantial to call for leniency. 497 U.S. at 650.

In fact, the Court has never held that the Constitution requires states to adopt, or bars them

from adopting, any specific standard of proof with respect to mitigating circumstances. The Constitution only requires that capital sentencing juries be allowed to consider mitigating evidence, broadly defined. *Blystone v. Pennsylvania*, 494 U.S. 299, 304-05 (1990). Otherwise, "the States are free to determine the manner in which a jury may consider mitigating evidence." *Kansas v. Marsh*, 548 U.S. 163, 171 (2006) (citing *Walton*, 497 U.S. at 652; *Boyde v. California*, 494 U.S. 370, 374 (1990)). Thus, there is neither a constitutional requirement that states adopt a particular burden of proof, nor a proscription against a particular burden (*e.g.* beyond a reasonable doubt). The Kansas Supreme Court's reasoning cannot be squared with this case law.

Further, the Kansas Supreme Court's analysis of the effect of the instructions here is flawed. The instructions do not impose *any* burden of proof on the defendant to prove mitigating circumstances. Nonetheless, the Kansas Supreme Court found constitutional error in the fact that the instructions do not *affirmatively state* that mitigating factors *"need not be proved beyond a reasonable doubt."* App. 512. Essentially, the court held "a per se violation of the Eighth Amendment occurs if a jury instruction correctly states that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt but fails to affirmatively state that mitigating evidence need not be proved beyond a reasonable doubt." *Gleason*, 329 P.3d at 1155 (Biles, J., dissenting). That holding is not and cannot be supported by this Court's decisions. *Id.* at 1155-56.

The state court's reasoning is even more questionable in light of *Kansas v. Marsh*. In finding that Kansas' death penalty law satisfied constitutional requirements, this Court in *Marsh* considered jury instructions very close to those at issue here. *Compare* App. 573-74 (jury instructions given here) *with Marsh*, 548 U.S. at 176 (quoting jury instructions given there). Although the question presented here was not before the Court in *Marsh*, the Court observed that, under Kansas' law, a defendant "appropriately bears the burden of proffering mitigating circumstances – a burden of production," but never bears a burden of proof. 548 U.S. at 178; *see also* 548 U.S. at 173. Had there been an Eighth Amendment error in the jury instructions in *Marsh* – strikingly similar to the instructions here – it seems beyond implausible that the Court would have cited those very instructions as part of the justification for why Kansas' weighing procedures satisfied constitutional requirements.

C. The Kansas Supreme Court's decision undermines the uniform interpretation and application of the Eighth Amendment in capital cases, and undermines Kansas' efforts to enforce its capital murder law.

Given that the Kansas Supreme Court's decision here creates a split of authority among the States, and runs counter to this Court's Eighth Amendment precedent, certiorari is warranted because the decision below undermines the uniform interpretation and application of the federal Constitution. *See Kansas v. Marsh*, 548 U.S. at 185 (Scalia, J., concurring) ("Turning a blind eye to federal constitutional error ...,

allowing it to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt.").

Further, certiorari is warranted in this case because the Kansas Supreme Court's decision has a severe impact on Kansas' efforts to enforce its capital murder law. The Kansas capital murder law is narrowly tailored and sparingly applied – currently, only nine offenders are under sentence of death in Kansas. If allowed to stand, the decision below will invalidate the death sentences juries have imposed on at least six defendants currently on death row in Kansas – two-thirds of such offenders.[4]

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[4] These six include: (1) the defendant in *Kansas v. Cheever*, 134 S.Ct. 596 (2013), a case now on remand to the Kansas Supreme Court from this Court's unanimous reversal in December 2013, (2) the respondent in this case, as well as his co-defendant, and (3) another defendant whose death sentence the Kansas Supreme Court reversed one week before this case. The Kansas Supreme Court's decisions in the latter two cases are the subject of Petitions for Writ of Certiorari Kansas has filed simultaneously with this Petition in cases entitled *Kansas v. Reginald Carr* and *Kansas v. Sidney Gleason*. The petition in Jonathan Carr's case includes all three questions presented here; the petition in *Gleason* includes the first question presented.

Second Question Presented

II. There is a clear split of authority between the Kansas Supreme Court and at least three federal Circuits on the question whether the Confrontation Clause applies to the "selection" phase of death penalty sentencing proceedings.

The second question presented is whether the Confrontation Clause applies to hearsay evidence admitted in the "selection" phase of a capital sentencing proceeding, *i.e.*, where "eligibility" for the death penalty already has been established. The Kansas Supreme Court phrased the question as "Does K.S.A. 21-4624(c)'s allowance of testimonial hearsay (b) violate the Confrontation Clause of the United States Constitution and *Crawford*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)?" App. 46. The court's answer was "yes." *Id.*

The Kansas Supreme Court set up and analyzed that question as follows:

> Thus the first question before us is whether *Crawford*'s interpretation and application of the Confrontation Clause reaches the penalty phase of a capital proceeding. The United States Supreme Court has not yet answered this question. Until we have a definitive answer from that Court, we recognize that other jurisdictions are split and we accept convincing arguments that confrontation law is applicable to a capital penalty phase trial.

App. 488 (citations omitted). Having concluded that the Confrontation Clause applies, the Kansas Supreme

Court opined that "Carr is right to question whether the State's mention of witness statements recorded in police reports during cross-examination of several defense witnesses should have been permitted." App. 489. Thus, the court directed that in any "penalty phase hearing on remand, we caution the parties and the district judge that Kansas now holds that the Sixth Amendment applies in the proceeding and that out-of-court testimonial hearsay may not be placed before the jury without a prior opportunity for the defendant to cross-examine the declarant." App. 489-90.

The Kansas Supreme Court cited three state court decisions as holding that the Confrontation Clause applies to capital sentencing proceedings. *See Vankirk v. State*, 385 S.W.3d 144 (Ark. 2011); *State v. Rodriguez*, 754 N.W.2d 672, 681 Minn. 2008); *State v. Hurt*, 702 S.E.2d 82 (N.C.App. 2010), *reversed by State v. Hurt*, 643 S.E.2d 173 (N.C. 2013). Notably, however, *none* of the three cases cited are in fact *capital punishment* cases. So the Kansas Supreme Court actually failed to point to *any* authority holding that the Confrontation Clause applies to capital sentencing proceedings. Thus, the Kansas Supreme Court appears to stand alone in that regard.

Instead, at least three federal Circuits have squarely held that the Confrontation Clause does not apply to such proceedings, and one decision of this Court strongly suggests, if not compels, that result. In *Williams v. New York*, 337 U.S. 241 (1949), the Court reviewed the death sentence of a defendant who complained that "the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he

had no opportunity for cross-examination or rebuttal." 337 U.S. at 243 (internal citations and quotations omitted). In sentencing the defendant, the trial judge "stated that the pre-sentence investigation revealed many material facts concerning appellant's background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt." 337 U.S. at 244.

Because the case predated formal incorporation of Sixth Amendment protections through the Fourteenth Amendment to make those requirements applicable to the states, the defendant phrased his challenge—and the Court analyzed it—as a "due process" claim of fundamental procedural fairness. 337 U.S. at 245. The Court rejected the claim for at least two reasons.

First, the Court pointed out that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by law." 337 U.S. at 246. But the historical basis was not the only reason for allowing such evidence in sentencing. As a second reason, the Court pointed out that "there are sound practical reasons for the distinction." 337 U.S. at 246. Indeed, "[h]ighly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." 337 U.S. at 247. Thus, "modern concepts individualizing punishment have made it all

the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information ...." 337 U.S. at 247.

The Court concluded that the "due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." 337 U.S. at 251. Furthermore, the Court declared that "we cannot accept the contention" that "we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed." 337 U.S. at 251. After discussing the necessarily individualized determination whether a defendant merits a death sentence, the Court stated that it "cannot say that the due-process clause renders a sentence void merely because the judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence." 337 U.S. at 252.

The Kansas Supreme Court never cited nor mentioned *Williams v. New York*, but the Kansas court did cite four federal Circuit decisions, all of which do address *Williams* and all of which reached the opposite conclusion of the Kansas Supreme Court. Most recently, in *United States v. Umana*, 750 F.3d 320 (4th Cir. 2014), a case that involved a challenge under the federal death penalty scheme, the majority concluded "that *Williams* squarely disposes of Umana's argument that the Sixth Amendment should apply to capital sentencing proceedings." 750 F.3d at 346. Thus, the *Umana* majority "conclude[d] that the Confrontation Clause does not preclude the introduction of hearsay statements during the sentence selection phase of capital sentencing." 750 F.3d at 348. The dissent

argued, however, that the case raised "an important constitutional question that the Supreme Court has not yet resolved." 750 F.3d at 360 (Gregory, J., dissenting).

In two other post-*Crawford* decisions, the Fifth and Eleventh Circuits also rejected the claim that the Confrontation Clause applies to the selection phase of capital sentencing procedings. In *Muhammad v. Sec., Fla. Dept. of Corrections*, 733 F.3d 1065 (11th Cir. 2013), the majority reviewed a death sentence imposed under Florida law and found no Confrontation Clause violation. The majority opined that the "Supreme Court of the United States has held that hearsay testimony is admissible at capital sentencing hearings." 733 F.3d at 1073 (citing *Williams*). After reviewing other Eleventh Circuit decisions, the majority declared that we "cleared up any confusion in our case law in *Chandler v. Moore*, 240 F.3d 907, 918 (11th Cir. 2001), when we confirmed that hearsay is admissible at capital sentencing and that a defendant's rights under the Confrontation Clause are not violated if the defendant has an opportunity to rebut the hearsay." 733 F.3d at 1076.

As in the Fourth Circuit, one judge dissented. 733 F.3d at 1081 (Wilson, J., dissenting). Although the dissent acknowledged that the "Supreme Court has held that trial courts may consider hearsay testimony at capital sentencing hearings," *id.* at 1081-1082, the dissent opined that *Williams* was no longer good law because it predated both incorporation of the Confrontation Clause against the States and the Supreme Court's much more recent confrontation decisions such as *Crawford*. 733 F.3d at 1082.

A panel of the Fifth Circuit also rejected the Confrontation Clause claim by a 2-1 vote in *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007), a federal death penalty case. The *Fields* majority opined that "*Williams* is a due process, rather than Sixth Amendment, case and therefore does not dictate the result of Fields's Confrontation Clause challenge." 483 F.3d at 327. Nonetheless, the majority declared "that *Williams*'s distinction between guilt and sentencing proceedings and its emphasis on the sentencing authority's access to a wide body of information in the interest of individualized punishment is relevant to our Confrontation Clause inquiry." 483 F.3d at 327.

After an extensive review of the arguments, the majority concluded that "the principles underlying *Williams* are relevant, persuasive, and ultimately fatal to Fields's Confrontation Clause challenge." 483 F.3d at 338. Emphasizing the "particular importance of individualized sentences in capital cases," the majority declined to hold sentencing proceedings to the standards of guilt phase proceedings "where, as here, challenged testimony is relevant only to a sentencing authority's selection decision." 483 F.3d at 338. One judge dissented, arguing that "*Williams v. New York* is not controlling" in part because "*Crawford* and *Apprendi* render *Williams* inapplicable." 483 F.3d at 364-365 (Benavides, J., dissenting).[5]

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[5] A Seventh Circuit decision that predates *Crawford* also rejects the argument, stating "the Supreme Court has held that the Confrontation Clause does not apply to capital sentencing. It applies through the finding of guilt, but not to sentencing, even when the sentence is the death penalty." *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002). The Seventh Circuit was reviewing a

So, at best, when the Kansas Supreme Court here cited all of these cases and held that "we accept convincing arguments that confrontation law is applicable to a capital penalty phase trial," App. 488, that court was agreeing with either (1) *dissenting opinions* in federal Circuit cases or (2) state appellate court opinions in *non-death penalty cases*. Thus, the Kansas Supreme Court's decision necessarily creates a split of authority between a state court of last resort and at least three federal Circuits on an important and recurring issue of federal constitutional law. The Court should grant review here to resolve the Confrontation Clause issue that is cleanly presented.

Third Question Presented

III. The question whether the general presumption in favor of joinder applies in capital cases is an issue of first impression in this Court that has resulted in divergent outcomes in the lower courts, as here, where the Kansas Supreme Court effectively adopted a per se rule against joinder in capital sentencing proceedings.

Despite acknowledging that severance was not automatically required in death penalty proceedings, the Kansas Supreme Court effectively established a *per se* rule requiring severance. Importantly, the court relied on the premise that the differentiation in the

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federal habeas challenge to an Illinois death sentence imposed in 1984, and the court opined that it "need not attempt to predict how the Supreme Court's jurisprudence will develop" because "*Williams v. New York* shows that in 1985 Illinois was entitled to proceed as it did." 313 F.3d at 399.

moral culpability of co-defendants necessarily affects the jury's ability to individually apply mercy to each defendant. App. 473-75. The court further concluded that any problem could not be cured by jury instructions; hence, Jonathan's death sentence violated the Eighth Amendment because, in the court's view, he failed to receive an individualized sentencing determination. App. 477-78. Because co-defendants will virtually always attempt to distinguish their moral culpability to avoid death sentences, *see, e.g.*, 18 U.S.C. § 3592(a)(4) (Jury may consider as mitigating factor that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death."), the Kansas Supreme Court's decision effectively creates a *per se* rule against joinder in capital sentencing proceedings and conflicts with the traditional presumption in favor of joinder in criminal cases.

A. This Court has never held that the Eighth Amendment mandates separate capital sentencing proceedings to protect the right to individualized sentencing, but the lower courts have divided over the question, reaching differing results.

The question presented here is an issue of first impression in this Court, but the Court has clearly expressed a preference for joint trials in criminal cases generally. *Zafiro v. United States*, 506 U.S. 534, 537-38 (1993) ("Joint trials 'play a vital role in the criminal justice system.' [Citation omitted.] They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'

[Citation omitted.] For these reasons, we repeatedly have approved of joint trials."). This presumption in favor of joinder does not evaporate and disappear in death penalty proceedings merely because co-defendants may attempt to distinguish their respective moral culpability.

The Eleventh Circuit has held the Eighth Amendment is not implicated *at all* in this context in determining whether severance is required, because severance is "not a part of [the] constitutional right to an individualized sentencing determination." *Puiatti v. McNeil*, 626 F.3d 1283, 1315-16 (11th Cir. 2010). The court explained that this Court's jurisprudence does not support recognizing an Eighth Amendment right against joinder:

> ...although Puiatti attempts to connect and intertwine severance with his constitutional right to an individualized sentencing determination, we can locate, and Puiatti has cited, no Supreme Court decision doing so. *Lockett* and its progeny do not address joint penalty phases or say that the presence of a co-defendant at a capital defendant's penalty phase trial has any Eighth Amendment implications whatsoever. None of the *Lockett* line of cases relates to severance or helps Puiatti's claim at all. Puiatti, like the district court, cites no precedent that suggests a joint penalty trial is improper for co-defendants who were properly joined in the guilt phase. The Supreme Court has never intimated, much less held, that the

> special concerns in capital cases require, or even suggest, that severance is necessary.

Id. at 1315.

In contrast, some district courts have permitted severance based on a perceived need to protect the principle of individualized sentencing. *E.g.*, *United States v. Catalan–Roman*, 376 F.Supp.2d 96, 107 (D.P.R. 2005) (disparity between the strength of the co-defendants' mitigating evidence); *United States v. Green*, 324 F.Supp.2d 311, 326 (D. Mass. 2004) (severance proper due to differing mitigation evidence which may raise Eighth Amendment concerns); *United States v. Taylor*, 293 F.Supp.2d 884, 889-900 (N.D.Ind.2003) (separate sentencing proceedings would ensure individualized consideration of each defendant's punishment); see also *United States v. Usama Bin Laden*, 156 F.Supp.2d 359 FN 2 (S.D.N.Y.2001) (court allowed sequential sentencing hearings for defendants Al-Owhali and Mohamed after they argued they would be "significantly disadvantaged" by a joint hearing); *United States v. Henderson*, 442 F.Supp.2d 159, 162 (S.D.N.Y. 2006) (court agreed to sequential penalty hearings based on the government's request and a prejudicial letter containing "admissions against interest by a declarant who committed suicide shortly after making it.").

Only one other court of last resort, however, has overturned a death sentence based on the denial of a motion to sever the penalty phase. See *Foster v. Commonwealth*, 827 S.W.2d 670, 683 (Ky. 1991) ("The accumulated errors in the admission of prior acts of misconduct, contents of letters written by Foster to Powell, and evidence regarding the battered wife

syndrome by Powell's expert all stem from the improvident decision of the trial court to hold a joint penalty phase. Individually, these errors might be considered by this Court to be harmless, but viewed together or "cumulatively," their commission requires reversal of Foster's sentence.").

A number of courts have determined that jury instructions requiring individualized consideration sufficiently protect any right to individualized sentencing in the context of joint proceedings. *E.g.*, *United States v. Tipton*, 90 F.3d 861 (4th Cir.1996) (no Eighth Amendment violation because the district court gave repeated instructions to consider the evidence against each capital defendant individually); *United States v. Bernard*, 299 F.3d 467 (5th Cir.2002) (under plain error review, instructions were sufficient to address the risk of prejudice); *People v. Carasi*, 190 P.3d 616, 649-50 (Cal. 2008) (instructions ensured the jury was adequately apprised of the individualized nature of the sentencing determination); *Gutierrez v. Dretke*, 392 F.Supp.2d 802, 828 (W.D. Tex. 2005) (instructions sufficiently prevented any possibility of prejudice); *United States v. Rivera*, 363 F.Supp.2d 814, 822-23 (E.D.Va.2005) (denying pre-trial severance request and holding that "threat posed to individualized consideration will best be addressed by a joint penalty phase governed by the Court's limiting instructions"); *Hardy v. State*, 804 So.2d 247, 264 (Ala. Crim. App. 1999) (instructions were sufficient to allow individualized sentencing determinations). The rulings of these courts are consistent with the general rule that juries are presumed to be able to follow their instructions. *Blueford v. Arkansas*, 566 U.S. ___, ___, 132 S.Ct. 2044, 2051 (2012).

In the end, the severance question is one of first impression for this Court, the question has resulted in differing outcomes in the lower courts, and it arises with regularity. For all of these reasons, the Court should grant certiorari to resolve whether there is an Eighth Amendment right to severance in capital sentencing proceedings.

B. Even if the Eighth Amendment were to require severance in some circumstances, this case does not present any such circumstance.

In reversing Jonathan's death sentence based on the failure to sever the penalty proceedings, the court summarily adopted the findings it had made in co-defendant Reginald's appeal: (1) Jonathan "continued the pattern he had set in the guilt phase by emphasizing that [Reginald] was the more culpable actor and a negative influence in [Jonathan's] life," App. 39, 472; (2) this mitigating factor created antagonistic defenses because the mitigation evidence differentiated between the brothers' moral culpability and could have impacted a juror's decision to show mercy App. 39, 473-75; (3) Jonathan's cross-examination of Temica resulted in her testimony that Reginald admitted to shooting the victims during a visit to the jail, App. 39, 476; (4) that testimony could have negated any juror's willingness to show mercy based on residual doubt, App. 39, 476; and (5) Jonathan's mitigating evidence could have been considered by the jury as an improper, nonstatutory aggravating circumstance against Reginald. App. 39, 477. The court further noted that it was relying on the "family circumstances argument" raised by Jonathan

and on prejudice to Jonathan flowing from Reginald's visible handcuffs during the penalty phase. App. 39.

The court's reasoning, however, is inherently flawed because the same rationale simply cannot be applied to both Reginald and Jonathan. Evidence of Reginald's heightened culpability would not have negatively affected Jonathan. Arguably, the very evidence Reginald considered most damaging to his plea for mercy actually helped any such plea by Jonathan. Thus, the Kansas Supreme Court's summary adoption of the same rationale it set forth in Reginald's appeal fails to rationally distinguish the brothers' cases; the court does not articulate how the failure to sever was erroneous or harmful to Jonathan. Even assuming, for the sake of argument, that there was error in Reginald's case, it does not follow that prejudice to one co-defendant automatically results in prejudice to another co-defendant.

More importantly, the Kansas Supreme Court erred in determining that any effect on the jury's ability to fully consider mercy required severance. The jury was instructed that "mercy can itself be a mitigating factor in determining whether the state has proved beyond a reasonable doubt that the death penalty should be imposed." App. 573. But consideration of mercy is not required by the Eighth Amendment. *See e.g. People v. Lewis*, 28 P.3d 34, 75 (Cal. 2001) (the Eighth Amendment does not require an instruction stating "[i]n determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant."); *State v. Lafferty*, 20 P.3d 342, 373 (Utah 2001) (federal constitution does not require an

instruction telling jurors they should be guided by mercy); *State v. Johnson*, 723 N.E.2d 1054, 1076, 1080 (Ohio 2000) (summarily finding no Eighth or Fourteenth Amendment error in instruction that "fairness" and "mercy" are to be excised from the definition of mitigating factors); *Commonwealth v. Rainey*, 656 A.2d 1326, 1333-34 (Pa. 1995) (counsel was not ineffective for failing to request a mercy instruction since allowing the jury unbridled discretion to grant mercy would be clearly erroneous); *Austin v. Bell*, 927 F.Supp. 1058, 1064 -65 (M.D.Tenn. 1996) (no Eighth Amendment violation in the Tennessee Death Penalty Act based on the failure to inform jury they may impose a life sentence out of mercy).

The Kansas Supreme Court's holding here essentially requires an instruction on mercy as a mitigating factor and mandates automatic severance in all death penalty cases. Because such a holding extends the Eighth Amendment's individualized sentencing requirement far beyond the Court's precedents, certiorari review is warranted.

C. The Kansas Supreme Court's conclusion that any error here could not be harmless because the jury could not be presumed to have followed its instructions misapplies this Court's constitutional harmless error analysis.

In concluding that reversal was required, the Kansas Supreme Court turned an unquestioned legal presumption on its head by refusing to believe the jury could follow the instructions given, instructions that plainly required the jury to give each brother individualized consideration in determining their

sentences. The court's rejection of such a foundational principle cannot stand in light of the holding in *Zafiro* that any possible prejudice generally can be cured by giving proper jury instructions. 506 U.S. at 539.

Moreover, even assuming any error occurred here, it was harmless in light of the atrocious and inhuman facts of the crimes Jonathan committed against his victims. Further, nothing prevented the jury from giving individualized consideration to the weak mitigating circumstances Jonathan presented. As the dissent noted, "the mitigating evidence simply pales in comparison to the aggravating factors." App. 66 (Moritz, J., dissenting).

Here, the Kansas Supreme Court improperly rejected the presumption that jurors follow their instructions, and ignored and discounted the overwhelming atrocity and inhuman nature of Jonathan's crimes against multiple victims. Even if the failure to sever the brothers' sentencing proceedings somehow violated the Eighth Amendment, any error was harmless. The Court should grant review of the Kansas Supreme Court's conclusion that joinder here was reversible Eighth Amendment error.

CONCLUSION

Kansas requests that the Petition for Writ of Certiorari be granted on all three questions presented.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. McALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
stevermac@fastmail.fm

Counsel for Petitioner

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 90,198

[Filed July 25, 2014]

STATE OF KANSAS, *Appellee*,	)
v.	)
JONATHAN D. CARR, *Appellant*.	)

SYLLABUS BY THE COURT

1.

The Sixth Amendment to the United States Constitution guarantees an accused in all serious criminal prosecutions the right to trial by an impartial jury. This protection is incorporated into and made applicable to the states through the due process provision of the Fourteenth Amendment. The Kansas Constitution includes a similarly worded guarantee for its citizens in Section 10 of the Bill of Rights, which recognizes a defendant's right to a speedy and public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. We have analyzed the state constitutional provision in the same way as the federal constitutional provision.

2.

K.S.A. 22-2616(1) gives Kansans a vehicle to obtain a change of venue to prevent a local community's hostility or preconceived opinion on a defendant's guilt from hijacking his or her criminal trial.

3.

Seven factors are considered relevant to evaluate whether the existence of presumed prejudice demands a change of venue: (1) media interference with courtroom proceedings; (2) the magnitude and tone of the coverage; (3) the size and characteristics of the community in which the crime occurred; (4) the amount of time that elapsed between the crime and the trial; (5) the jury's verdict; (6) the impact of the crime on the community; and (7) the effect, if any, of a codefendant's publicized decision to plead guilty.

4.

On appeal, a claim of presumed prejudice is judged by a mixed standard of review. A district judge's findings of fact on the seven relevant factors considered in determining whether presumed prejudice demands a change of venue are examined to determine whether they are supported by substantial competent evidence in the record. The district court's weighing of the factors and ultimate legal conclusion on whether presumed prejudice has been established is reviewed de novo.

5.

In this case, the district judge did not err by refusing defendant's motions to transfer venue out of Sedgwick County on the basis of presumed prejudice.

6.

In reviewing for actual prejudice from refusal to change venue, an appellate court examines whether the district judge had a reasonable basis for concluding that the jurors selected could be impartial. The crucible for determination of actual prejudice is voir dire. The judge must review the media coverage and the substance of the jurors' statements at voir dire to determine whether a community-wide sentiment exists against the defendant. Negative media coverage by itself is insufficient to establish actual prejudice.

7.

A district judge's decision on actual prejudice is reviewed under an abuse of discretion standard.

8.

In this case, all of defendant's jurors who had formed an opinion on guilt said during voir dire they could put their opinions aside. These voir dire responses gave the district judge a reasonable basis for ruling that no actual prejudice required a venue change. This case was not so extreme that the jurors' statements about their ability to be impartial cannot be credited.

9.

Under K.S.A. 22-2616(1), the burden is on the defendant to show prejudice in the community significant enough that there is a reasonable certainty he or she cannot obtain a fair trial without a venue change.

10.

Factors to be considered on whether a venue change is necessary under the Kansas statute include: (1) the particular degree to which the publicity circulated throughout the community; (2) the degree to which the publicity or that of a like nature circulated to other areas to which venue could be changed; (3) the length of time which elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the ease encountered in the selection of the jury; (5) the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; (6) the challenges exercised by the defendant in the selection of the jury, both peremptory and for cause; (7) the connection of government officials with the release of the publicity; (8) the severity of the offense charged; and (9) the particular size of the area from which the venire is drawn.

11.

In this case, the district judge did not abuse his discretion by denying defendant's motions for change of venue under K.S.A. 22-2616(1).

12.

Although two or more defendants may be charged in the same complaint, information, or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the charged crime or crimes, the court may order a separate trial for any one defendant when requested by the defendant or the prosecutor. The decision whether to sever a trial is one within the trial court's discretion.

13.

A single trial of multiple defendants may serve judicial economy and ensure consistent verdicts, but the right of a defendant to a fair trial must be the overriding consideration. Five factors are useful for an appellate court to consider in determining whether there is sufficient prejudice to mandate severance: (1) whether the defendants have antagonistic defenses; (2) whether important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial; (3) whether evidence incompetent as to one defendant and introducible against another would work prejudicially to the former with the jury; (4) whether the confession by one defendant, if introduced and proved, would be calculated to prejudice the jury against the other or others; and (5) whether one of the defendants who could give evidence for the whole or some of the other defendants would become a competent and compellable witness on the separate trials of such other defendants.

14.

A party moving for severance has the burden to demonstrate actual prejudice to the district court judge, who has a continuing duty at all stages of a trial to grant severance if prejudice does appear.

15.

On appeal from a denial of severance, the party claiming error has the burden to establish a clear abuse of discretion by the trial judge. Once abuse of discretion is established, the party benefitting from the error bears the burden of demonstrating harmlessness.

16.

The district judge abused his discretion in this case by repeatedly refusing to sever the defendant's trial from that of his codefendant brother. However, because of the overwhelming independent evidence presented by the State, the judge's failure to sever the guilt phase of the trial was harmless error.

17.

An appellate court examines a district judge's denial of a mistrial for abuse of discretion. The party alleging abuse bears the burden of proving that his or her substantial rights to a fair trial were prejudiced. The first question is whether the district judge abused his or discretion when deciding whether there was a fundamental failure of the proceedings. If so, then the second question is whether the district judge abused his or her discretion in deciding whether the problematic conduct resulted in prejudice that could not be cured or mitigated through jury admonition or

instruction, resulting in an injustice. Although counsel for codefendant made remarks during opening statement that made antagonistic defenses and fundamental failure of proceedings inescapably clear, the district judge in this case did not abuse his discretion in denying a motion for mistrial.

18.

The district judge in this case did not abuse his discretion by denying defendant's motion to sever noncapital counts from capital counts. Similarity of punishment is not an indispensable attribute of crimes of same or similar character under K.S.A. 22-3202(1).

19.

K.S.A. 22-3410(2)(i) permits a district judge to remove a prospective juror for cause when his or her "state of mind with reference to the case or any of the parties" persuades the judge that there is doubt he or she can act impartially. A criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. But this right is balanced against the State's strong interest in seating jurors who are able to apply the sentence of capital punishment within the framework provided for by the federal Constitution and state law.

20.

In this case, the district judge's excuse of prospective juror M.W. for cause was fairly supported by the record and not an abuse of discretion under K.S.A. 22-3410(2)(i). Eleven other prospective jurors to whom defendant and his codefendant brother compare

M.W. expressed a willingness to follow the law while M.W. did not.

21.

The same standard of review and legal framework applicable to a district judge's decision to excuse a prospective juror who cannot set aside his or her objection to the death penalty applies equally to decisions not to excuse prospective jurors challenged for cause based on their inability to consider a sentence other than death.

22.

The district judge's refusal to excuse four prospective jurors for cause was fairly supported by the record and not an abuse of discretion under K.S.A. 22-3410(2)(i). These four prospective jurors expressed a willingness to consider and give effect to mitigating evidence.

23.

Section 7 of the Kansas Constitution Bill of Rights provides that "no religious test or property qualification shall be required for any office of public trust." This section does not provide any greater limitation than already provided under K.S.A. 43-156, which provides that "[n]o person shall be excluded from service as a grand or petit juror in the district courts of Kansas on account of religion ."

24.

K.S.A. 43-156 is in some tension with K.S.A. 22-3410(2)(i)—which provides that a prospective juror may be challenged for cause as unqualified to serve when he

or she is partial or biased—because K.S.A. 22-3410(2)(i) requires a prospective juror who can never participate in imposition of the death penalty to be excused for cause as partial, even though his or her scruples have a basis in a religious code. Jurors cannot be discriminated against on the basis of their religious belief or lack of belief, but they can be excluded from jury service when their belief or nonbelief makes it impossible for them to act in conformance with the signature requirement of that service: impartiality under the rule of law.

25.

In this case, the district judge did not violate Section 7 of the Kansas Constitution Bill of Rights or K.S.A. 43-156 when he excused prospective jurors for cause because they had said their religious beliefs would prevent them from behaving impartially.

26.

A district judge's handling of a challenge to a criminal defendant's peremptory strike under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), involves three steps, each subject to its own standard of review on appeal. Under the first step, the party challenging the strike must make a prima facie showing that the other party exercised a peremptory challenge on the basis of race. Appellate courts utilize plenary or unlimited review over this step. If a prima facie case is established, the burden shifts to the party exercising the strike to articulate a race-neutral reason for striking the prospective juror. This reason must be facially valid, but it does not need to be persuasive or plausible. The reason offered will be deemed race-

neutral unless a discriminatory intent is inherent in the explanation. The opponent of the strike continues to bear the burden of persuasion. The scope of review on a district judge's ruling that the party attempting the strike has expressed racially neutral reasons is abuse of discretion. In the third step, the district judge determines whether the party opposing the strike has carried its burden of proving purposeful discrimination. This decision is reviewed under an abuse of discretion standard.

27.

The district judge erred in this case by granting the State's challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to the defendants' peremptory strikes of the eventual presiding juror by failing to perform the necessary three steps of analysis.

28.

Each state is free to determine whether a district judge's good faith error in denying a criminal defendant's peremptory challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), is subject to review for harmlessness. In Kansas, review for harmless error applies to such error, and the district judge's error in this case does not require reversal of all of defendant's convictions, standing alone.

29.

In this case, because defendants did not object to testimony from a felony-murder victim's neighbor and husband about the victim's out-of-court statements to

them, any issue based on that testimony under the Confrontation Clause or *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), was not preserved for appeal. Any error in admission of testimony from law enforcement witnesses about the victim's statements that was subject to defense objection based on the Confrontation Clause or *Crawford* was harmless because the testimony was largely repetitive of the testimony admitted without objection.

30.

When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. A conviction for felony murder cannot stand without sufficient evidence of one of the enumerated inherently dangerous felonies listed in K.S.A. 21-3436.

31.

Viewed in the light most favorable to the prosecution, the evidence in this case was sufficient to convict defendant of felony murder, without impermissible inference stacking.

32.

Under *State v. Todd*, 299 Kan. 263, 323 P.3d 829, 840, (2014), and *State v. Gleason*, No. 97,296, 299 Kan. ___, ___ P.3d ___ (filed July 18, 2014), defendant was not entitled to lesser included instructions for felony murder because a subsequent statutory amendment

abolishing any lesser included offenses for that crime can be applied to defendant without violation of the Ex Post Facto Clause or due process.

33.

In this case, the jury instructions on capital murder under K.S.A. 21-3439(a)(4) failed to state the elements of the crime because they relied on sex-crime instructions defining the underlying sex crime for a victim other than the victim of the capital murder. In addition, three of the four counts of capital murder under K.S.A. 21-3439(a)(6) were multiplicitous with the first count. Under *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931), and *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), the combination of these errors requires reversal of three of the defendant's four convictions of capital murder.

34.

The defendant's appellate claim that a special unanimity instruction was required because of a multiple acts problem on the capital murders charged under K.S.A. 21-3439(a)(4) is moot.

35.

The defendant's appellate claim that he is entitled to reversal of his convictions for sex offenses on which capital charges under K.S.A. 21-3439(a)(4) were based is moot.

36.

In this case, the State's evidence against the defendant on aggravated burglary, viewed in the light

most favorable to the prosecution, was sufficient to support a reasonable factfinder's verdict of guilty.

37.

Although it is possible to prosecute a male as a principal or an aider or abettor for causing a rape or attempted rape under Kansas law, the State did not succeed in charging those crimes here; and the defendant's convictions based on coerced victim-on-victim sex acts are void because the amended complaint failed to endow the district court with subject matter jurisdiction.

38.

The State's evidence against the defendant of a victim's digital penetration of herself, viewed in the light most favorable to the prosecution, was sufficient to support a reasonable factfinder's guilty verdict on rape.

39.

In this case, the defendant's conviction for penile rape of a victim immediately after digital rape of the same victim rests on unitary conduct and must be reversed as multiplicitous.

40.

In this case, abundant evidence supported the defendant's conviction as an aider and abettor of his codefendant's sex crimes. It is not necessary that an aider and abettor be contemporaneously aware that his or her principal is committing a crime that the aider and abettor has encouraged or facilitated. It also is not necessary that an aider and abettor be in the

immediate vicinity of the principal and the victim during commission of the crime.

41.

The district judge in this case did not err by admitting evidence of the results of mitochondrial DNA testing of four hairs found at the crime scene, which narrowed the list of contributors to maternal relatives of the defendant. This was circumstantial evidence of the defendant's presence at the scene, even though more precise nuclear DNA analysis of one hair was admitted at trial.

42.

Under K.S.A. 2013 Supp. 21-5402(d), felony murder is not a lesser included offense of capital murder. Application of this statute to a defendant whose direct appeal was pending at the time the statute took effect does not violate the Ex Post Facto Clause or due process.

43.

It is an abuse of discretion for a district judge to automatically exclude expert testimony on the reliability of eyewitness identifications. However, on the entire record in this case, there is no reasonable probability the judge's error affected the outcome of the trial of the defendant.

44.

A jury view is nonevidentiary and not a critical stage of a criminal prosecution requiring the presence of a criminal defendant; neither the defendant's statutory nor his constitutional right to be present at

all critical stages of the proceedings against him was violated by the judge's failure to ensure his presence during the jury view in this case.

45.

A jury view may occur outside of the presence of a criminal defendant's counsel without violating the Sixth Amendment or K.S.A. 22-4503.

46.

Given the cautionary eyewitness identification instruction's inclusion of "any other circumstances that may have affected the accuracy of the identification" as a catch-all factor the jury was permitted to consider, there was no error in the judge's omission of the defendant's requested language, "the race of the witness and the race of the person observed." Under the catch-all factor's broad language, counsel for the defense were free to argue any factor the evidence would support.

47.

In this case, the district judge committed error by giving both PIK Crim. 3d 54.05 (Responsibility for Crimes of Another) and PIK Crim. 3d 54.06 (Responsibility for Crimes of Another—Crime Not Intended), when the defendant was charged with specific intent crimes demanding proof of premeditation. The error does not merit reversal as clear error because of the strength of the State's premeditation case.

48.

A jury instruction stating "[a] person who, either before or during its commission, intentionally aids, abets, advises, or counsels another to commit a crime with intent to promote or assist in its commission is criminally responsible for the crime committed regardless of the extent of the person's participation, if any, in the actual commission of the crime" is adequate to communicate that the aider and abettor must personally possess the same specific intent as the principal. There was no error in this case attributable to the district judge's failure to tell the jury explicitly that the State must prove an aider and abettor's premeditation in order to convict him of capital murder or attempted first-degree premeditated murder.

49.

Omission of "by such person as a probable consequence of committing or attempting to commit the crime intended" from the end of PIK Crim. 3d 54.06 does not result in clear error because of a failure to communicate a need for causation and a measurement of probability.

50.

A prosecutor is permitted wide latitude in discussing the evidence. The prosecutor's first few dramatic sentences in her closing argument on this 58-count case did not exceed the wide latitude by inviting jurors to put themselves in the position of the victims.

51.

Cumulative error can require reversal of all of a criminal defendant's convictions even when one error standing alone does not. Cumulative error does not require reversal of all of the defendant's convictions in this case.

52.

The Eighth Amendment to the United States Constitution requires a jury to make an individualized capital sentencing determination. It does not categorically mandate separate penalty phase proceedings for each codefendant in a death penalty case. The Eighth Amendment was violated in this capital case when the district judge refused to sever the penalty phase of the proceedings; because the codefendants' mitigation cases were at least partially antagonistic; because evidence admitted in the joint penalty phase may not have been admitted in a severed proceeding; and because mitigating evidence as to one codefendant was prone to be used by the jury as improper, nonstatutory aggravating evidence against the other.

53.

The standard of review and the ultimate question that must be answered with regard to whether error in the penalty phase of a capital trial was harmless is whether the court is able to find beyond a reasonable doubt that the error, viewed in the light of the record as a whole, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances. The test is not whether a death penalty sentence would have been

imposed but for the error; instead the inquiry is whether the death verdict actually rendered in this trial was surely unattributable to the error. In this case, the judge committed reversible error by refusing to sever the penalty phase of the codefendants' trial.

54.

The State's compliance with K.S.A. 21-4624(a) provides a capital murder defendant with constitutionally sufficient notice of aggravating factors.

55.

K.S.A. 2013 Supp. 21-6624's aggravators—that the defendants knowingly or purposely killed or created a great risk of death to more than one person; that they committed the crime for themselves or for another for the purpose of receiving money or any other thing of monetary value; that they committed the crime in order to avoid or prevent a lawful arrest or prosecution; and that they committed the crime in an especially heinous, atrocious, or cruel manner—are adequate to channel the jury's discretion in the penalty phase of a capital case.

56.

Due process requires a reasonably accurate and complete record of the trial proceeding in order to allow meaningful and effective appellate review. And, when a claim appears to have a substantial foundation based on the available record but the claim cannot be reviewed because of the incomplete or inaccurate transcript, the proper remedy is reversal. Still, a defendant does not have a constitutionally protected right to a totally accurate transcript of the criminal

proceedings. A record that is incomplete but that involves no substantial or significant omissions does not require reversal. Appellants seeking reversal on the grounds that they are denied due process because of an inaccurate or incomplete transcript must make the best feasible showing possible that a complete and accurate transcript might have changed the outcome of the appeal. If no such showing is made, no relief is appropriate.

57.

K.S.A. 21-4624(c) provides for a relaxed evidentiary standard during the penalty phase of a capital proceeding:

> "In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible."

58.

K.S.A. 21-4624(c)'s relaxed evidentiary standard of admission is consistent with the United States Supreme Court's all relevant evidence doctrine, which demands that a capital sentencing jury have before it all possible relevant information about the individual defendant whose fate it must determine. It provides for an individualized inquiry and does not limit the discretion of the sentencer to consider relevant circumstances offered by the defendant. K.S.A. 21-4624(c) provides that only relevant evidence is to be admitted, thus assuring the evidence actually has probative value. Moreover, evidence secured in violation of the United States Constitution or the Kansas Constitution is inadmissible. The relaxed evidentiary standard is sufficient to protect the defendant's right to a fair trial and does not violate either the United States or Kansas Constitutions.

59.

The Sixth Amendment Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), apply in the penalty phase of a capital case and control over any contrary interpretation or application of K.S.A. 21-4624(c).

60.

In order to be admissible in a penalty phase of a capital trial, mitigating evidence must be relevant to the defendant. The district judge in this case did not abuse his discretion by excluding general testimony about parole likelihood, including an explanation of the statutory rubric and statistics on past paroles of others.

61.

Testimony about the impact of a defendant's execution must be probative on the material question of the defendant's character.

62.

A State expert's testimony about other experts' out-of-court agreement with him is subject to evaluation for admissibility under the Sixth Amendment, *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and K.S.A. 21-4624(c).

63.

Rebuttal evidence is that which contradicts evidence introduced by an opposing party. It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. Such evidence includes not only testimony that contradicts the witnesses on the opposite side, but also corroborates previous testimony. There is no inflexible legal requirement that rebuttal or surrebuttal evidence be new. A district judge who excludes surrebuttal testimony because he or she believes it will not be new abuses his or her discretion.

64.

In the absence of a request, the trial court has no duty to inform the jury in a capital murder case of the term of imprisonment to which a defendant would be

sentenced if death were not imposed. Where such an instruction is requested, the trial court must provide the jury with the alternative number of years that a defendant would be required to serve in prison if not sentenced to death. Additionally, where a defendant has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the possible terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be served consecutive to or concurrent with each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court.

65.

A district judge must instruct a penalty phase jury in a capital case not only that it need not be unanimous on the existence of a mitigating circumstance but also that a mitigating circumstance need not be proved beyond a reasonable doubt.

66.

It is inadvisable for an aggravating circumstances instruction in the penalty phase of a capital case to reference a generic crime rather than capital murder.

67.

An instruction to a jury in a penalty phase of a capital case that reads: "Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense. In this proceeding, you may consider sympathy for a

defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed," is not erroneous because it equates mercy to a mitigating factor.

68.

The aggravating circumstances instruction for a penalty phase in a capital case must be corrected to be consistent with the verdict form designed to cover the situation when the jury agrees unanimously on the existence of an aggravating circumstance but cannot agree unanimously on how it weighs against any mitigation.

Appeal from Sedgwick District Court; PAUL W. CLARK, judge. Opinion filed July 25, 2014. Affirmed in part, reversed in part, sentence of death vacated, and case remanded.

Sarah Ellen Johnson, of Capital Appellate Defender Office, argued the cause, and *Rebecca E. Woodman* and *Meryl Carver-Allmond*, of the same office, were with her on the briefs for appellant.

David Lowden, chief assistant district attorney, argued the cause, and *Debra S. Peterson*, special prosecutor, *Leslie A. Isherwood*, assistant district attorney, *Nola Tedesco Foulston*, former district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

Per Curiam: Defendant Jonathan D. Carr, and his brother, Reginald Dexter Carr, Jr., were jointly charged, tried, convicted, and sentenced for crimes committed in a series of incidents in December 2000 in Wichita. This is J. Carr's direct appeal from his 43 convictions and four death sentences.

Our opinion in codefendant R. Carr's direct appeal also is filed today. *State v. Carr*, No. 90,044, 299 Kan. ___, ___ P.3d ___. With the exception of the brief introduction to follow, this opinion will refer to the opinion in R. Carr's appeal as much as possible, rather than repeat facts, procedural history, or legal discussions and resolutions.

The first incident giving rise to the charges in this case occurred on December 7 and 8. Andrew Schreiber was the victim. The State charged J. Carr and R. Carr with one count of kidnapping, one count of aggravated robbery, one count of aggravated battery, and one count of criminal damage to property. The jury acquitted J. Carr on all counts and convicted R. Carr on all counts.

In the second incident on December 11, Linda Ann Walenta was the victim. The State charged J. Carr and R. Carr with one count of first-degree felony murder. The jury convicted both men.

In the third incident on December 14 and 15, Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims of an invasion at the men's Birchwood Drive home that led to sex crimes, kidnappings, robberies, and, eventually, murder and attempted murder. The State charged J. Carr and R. Carr with eight alternative counts of capital murder, four based

on a related sex crime under K.S.A. 21-3439(a)(4) and four based on multiple first-degree premeditated murders under K.S.A. 21-3439(a)(6); one count of attempted first-degree murder; five counts of aggravated kidnapping; nine counts of aggravated robbery, eight of which were alternatives, four based on use of a dangerous weapon and four based on infliction of bodily harm; one count of aggravated burglary; 13 counts of rape, eight of which were based on coerced victim-on-victim sexual intercourse and one of which was based on a victim's coerced self-penetration; three counts of aggravated criminal sodomy, two of which were based on coerced victim-on-victim oral sex; seven counts of attempted rape, six of which were based on coerced victim-on-victim overt acts toward the perpetration of rape; one count of burglary; and one count of theft. The State also charged J. Carr and R. Carr with one count of cruelty to animals because of the killing of Holly G.'s dog. The jury convicted J. Carr and R. Carr on all of the charges arising out of the Birchwood incident.

In connection with the three incidents, the State also charged R. Carr alone with three counts of unlawful possession of a firearm. The jury convicted him on these three counts as well.

After J. Carr's acquittal on the Schreiber incident and the defendants' convictions on all other charges, in a separate capital penalty proceeding, J. Carr and R. Carr were sentenced to death for each of the four capital murders committed on December 15. They each received a hard 20 life sentence for the Walenta felony murder. J. Carr received a controlling total of 492 months' imprisonment consecutive to the hard 20 life

sentence, and R. Carr received a controlling total of 570 months' imprisonment consecutive to the hard 20 life sentence for the remaining non-death-eligible convictions.

In his briefs, J. Carr raises 21 issues tied to the guilt phase of his prosecution and 16 issues tied to the death penalty phase of his prosecution. In addition, because this is a death penalty case, this court is empowered to notice and discuss unassigned potential errors under K.S.A. 2013 Supp. 21-6619(b), which we do. J. Carr does not challenge the sentences he received for the Walenta felony murder; for the crimes in which Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims that were not eligible for the death penalty; or for the cruelty to animals conviction.

Both sides sought many extensions of time to file briefs in this appeal and in R. Carr's separate appeal. In J. Carr's case, all of these extension requests were unopposed by the other side of the case. After completion of briefing, this court heard oral argument on December 17, 2013.

After searching review of the record, careful examination of the parties' arguments, extensive independent legal research, and lengthy deliberations, we affirm 25 of J. Carr's 43 convictions, including those for one count of capital murder of Heather M., Aaron S., Brad H., and Jason B. under K.S.A. 21-3439(a)(6) and for the felony murder of Walenta. We reverse the three remaining convictions for capital murder because of charging and multiplicity errors. We also reverse his convictions on Counts 25, 26, 29 through 40, and 42 for coerced sex acts for similar reasons. We affirm the

convictions based on Counts 2, 9 through 24, 27, 28, 41, and 43 through 55.

We vacate J. Carr's death sentence for the remaining capital murder conviction, because the district judge refused to sever the defendants' penalty phase trials. We remand to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND FOR GUILT PHASE ISSUES

The general factual and procedural background for the guilt phase issues in this case is set out in full in the R. Carr opinion. We need not repeat it or supplement it here. To the extent additional, issue-specific factual or procedural background is necessary to resolve any legal issue unique to J. Carr, it will be included in the discussion sections below.

GUILT PHASE ISSUES AND SHORT ANSWERS

We begin our discussion by setting out the questions we answer today on the guilt phase of J. Carr's trial. We have taken the liberty of reformulating certain questions to focus on their legally significant aspects or effects. We also have reordered questions raised by the defense and have inserted among them unassigned potential errors noted by us, because we believe this organization enhances clarity. We number the questions disposed of by our opinion in R. Carr's appeal 1 through 21, despite occasional intervening subheadings. We do not repeat our full discussion of these questions in this opinion; rather, we include only their short answers and references to the appropriate sections of the R. Carr opinion that control the resolution of the similar issues raised or noticed in this

appeal. We number the four additional questions not disposed of by our opinion in R. Carr's appeal J1 through J4. Our short answer to each question follows the question. We then discuss these four questions fully in individual sections of this opinion.

Issues Disposed of by Opinion in R. Carr Appeal

Issues Affecting All Incidents

1. Did the district judge err in refusing to grant defense motions for change of venue? A majority of six of the court's members answers this question no for reasons explained in Section 1 of the R. Carr opinion, while one member of the court dissents and writes separately on this issue and its reversibility, standing alone.

2. Did the district judge err in refusing to sever the guilt phase of defendants' trial? A majority of six members of the court answers this question yes for reasons explained in Section 2 of the R. Carr opinion, while one member of the court dissents and writes separately on this issue. A majority of four members of the court agrees that any error on this issue was not reversible standing alone for reasons explained in the R. Carr appeal, while three members of the court dissent, and one of them writes separately for the three on the reversibility question.

3. Was it error for the State to pursue conviction of J. Carr for all counts arising out of the three December 2000 incidents in one prosecution? The court unanimously answers this question no for reasons explained in Section 3 of the R. Carr opinion.

4. Did the district judge err (a) by excusing prospective juror M.W., who opposed the death penalty, for cause, (b) by failing to excuse allegedly mitigation-impaired jury panel members W.B., D.R., D.Ge., and H.Gu. for cause, or (c) by excusing prospective jurors K.J., M.G., H.D., C.R., D.H., and M.B., who expressed moral or religious reservations about the death penalty, for cause? The court unanimously agrees there was no error on any of these bases for reasons explained in Section 4 of the R. Carr opinion.

5. Did the district judge err by rejecting a defense challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct 1712, 90 L. Ed. 2d 69 (1986), to the State's peremptory strike of juror and eventual foreperson W.B.? The court unanimously answers this question yes for reasons explained in Section 5 of the R. Carr opinion. A majority of four members of the court agrees that any error on this issue was not reversible standing alone for reasons explained in Section 5 of the R. Carr opinion, while three members of the court dissent, and one of them writes separately for the three on the reversibility question.

Issue Specific to Walenta Incident

6. Was the district judge's admission of statements by Walenta through law enforcement error under the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)? The court unanimously answers this question yes for reasons explained in Section 6 of the R. Carr opinion, but the court also unanimously agrees that this error was not reversible standing alone.

Issues Specific to Quadruple Homicide and Other Birchwood Crimes

7. Did faulty jury instructions on all four K.S.A. 21-3439(a)(4) sex-crime-based capital murders and a multiplicity problem on three of four K.S.A. 21-3439(a)(6) multiple-death capital murders combine to require reversal of three of J. Carr's death-eligible convictions? The court unanimously answers this question yes for reasons explained in Section 9 of the R. Carr opinion.

8. Was a special unanimity instruction required for Counts 1, 3, 5, and 7 because of multiple sex crimes underlying each count? The court declines to reach the merits of this issue for reasons explained in Section 10 of the R. Carr opinion.

9. Must sex crime convictions underlying capital murder Counts 1, 3, 5, and 7 be reversed because they were lesser included offenses of capital murder under K.S.A. 21-3439 (a)(4)? The court declines to reach the merits of this issue for reasons explained in Section 11 of the R. Carr opinion.

10. Was the State's evidence of aggravated burglary sufficient? The court unanimously answers this question yes for reasons explained in Section 12 of the R. Carr opinion.

11. Did the State fail to correctly charge and the district judge fail to correctly instruct on coerced victim-on-victim rape and attempted rape, as those crimes are defined by Kansas statutes, rendering J. Carr's convictions on those offenses void for lack of subject matter jurisdiction? The court unanimously

answers this question yes for reasons explained in Section 13 of the R. Carr opinion.

12. Was the State's evidence of J. Carr's guilt as a principal on Count 41 for Holly G.'s digital self-penetration sufficient? A majority of four of the court's members answers this question yes for reasons explained in Section 14 of the R. Carr opinion, while three members of the court dissent, and one of them writes separately for the two of them on this issue and its reversibility.

13. Were Count 41 and Count 42 multiplicitous? The court unanimously answers this question yes and reverses J. Carr's conviction as a principal on Count 42 for reasons explained in Section 15 of the R. Carr opinion.

14. Was evidence of results from mitochondrial DNA testing of hairs found at the Birchwood home erroneously admitted? The court unanimously answers this question no for reasons explained in Section 19 of the R. Carr opinion.

15. Did the district judge err by failing to instruct on felony murder as a lesser included crime of capital murder? The court unanimously answers this question no for reasons explained in Section 21 of the R. Carr opinion.

Other Evidentiary Issues

16. Did the district judge err by automatically excluding eyewitness identification expert testimony proffered by the defense? The court unanimously answers this question yes for reasons explained in Section 22 of the R. Carr opinion, but the court also

unanimously agrees that any error on this issue was not reversible standing alone.

17. Did the district judge err by permitting a jury view of locations referenced in evidence, in violation of the defendants' right to be present, right to assistance of counsel, and right to a public trial? The court unanimously answers this question no for reasons explained in Section 23 of the R. Carr opinion.

Other Instructional Issues

18. Did the district judge err by failing to include language in the instruction on reliability of eyewitness identifications to ensure that jurors considered possible infirmities in cross-racial identifications? The court unanimously answers this question no for reasons explained in Section 24 of the R. Carr opinion.

19. Was the instruction on aiding and abetting erroneous because (a) it permitted jurors to convict the defendants as aiders and abettors for reasonably foreseeable crimes of the other, regardless of whether the State proved the aider and abettor's premeditation, (b) it failed to communicate that the defendant aider and abettor had to possess the premeditated intent to kill in order to be convicted of capital murder, or (c) it omitted language from K.S.A. 21-3205(2)? The court unanimously answers the first question yes for reasons explained in Section 25 of the R. Carr opinion. The court unanimously answers the second question no for reasons explained in Section 25 of the R. Carr opinion. The court unanimously answers the third question no for reasons explained in Section 25 of the R. Carr opinion. The court unanimously agrees that the error on the first question was not reversible standing alone

for reasons explained in Section 25 of the R. Carr opinion.

Prosecutorial Misconduct

20. Did one of the prosecutors commit reversible misconduct by telling jurors to place themselves in the position of the victims? The court unanimously answers this question no for reasons explained in Section 26 of the R. Carr opinion.

Cumulative Error

21. Did cumulative error deny J. Carr a fair trial on his guilt? A majority of four of the court's members answers this question no for reasons explained in Section 27 of the R. Carr opinion, while three members of the court dissent, and one of them writes separately for them on this issue.

Issues Not Disposed of by Opinion in R. Carr Appeal

J1. Did the district judge err by refusing to grant a mistrial when the opening statement by R. Carr's counsel implicated J. Carr and another unknown man as the perpetrators of the Birchwood crimes? A majority of four of the court's members answers this question no. Three members of the court would hold this to be error and include it among those considered under the cumulative error doctrine.

J2. Did admission of Walenta's statements violate J. Carr's confrontation rights under Section 10 of the Kansas Constitution Bill of Rights? The court declines to reach the merits of the Section 10 argument.

J3. Did J. Carr's conviction on the Walenta felony murder depend upon impermissible inference stacking,

meaning the State's evidence was insufficient? A majority of six members of the court answers this question no. One member of the court dissents and writes separately on this issue and its reversibility, standing alone.

J4. Was the State's evidence of J. Carr's guilt as an aider and abettor of R. Carr's rape and aggravated criminal sodomy of Holly G. sufficient? The court unanimously answers this question yes.

J1. Refusal to Grant Mistrial after Opening Statements

This court rules today in the R. Carr appeal that District Judge Paul Clark erred by refusing to sever the defendants' guilt phase trials but that the error does not require reversal standing alone. See *State v. Carr*, 299 Kan. at ___ (slip op. at 125). These holdings apply equally to this appeal on behalf of J. Carr.

J. Carr has argued additional reasons peculiar to him why severance was required—that a joint trial limited his ability to introduce certain hearsay testimony through Tronda Adams, that it allowed R. Carr to act as a second prosecutor by introducing testimony from Stephanie Donley and a statement from Holly G. that were inculpatory of J. Carr, and that it permitted the jury to observe and be prejudiced by R. Carr's improper courtroom behavior. But these reasons, if meritorious, would only add weight to our holding that the failure to sever was error. They would not persuade us that reversal of all of J. Carr's convictions is required as a result of that error.

We mention the severance issue in this context because it is distinct from but related to the unique

challenge J. Carr makes on this appeal to Judge Clark's refusal to grant him a mistrial after opening statements.

R. Carr's counsel told the jury during opening statement that his client merely stored property stolen from the Birchwood victims for J. Carr and another unknown, uncharged third man, suggesting that J. Carr and the third man were responsible for all of the charged Birchwood crimes. These remarks prompted an objection from counsel for J. Carr on the grounds that they were argumentative and unsupported by the evidence. Judge Clark overruled the objection.

This ruling by Judge Clark was correct. Counsel for R. Carr began his explanation of what happened on the night of December 14 and 15, 2000, with the phrase "the evidence will show." That phrase signals the purpose of opening statement; it provides an opportunity for counsel to outline a version of events that he or she expects the evidence to prove to the jury. *State v. Kleypas*, 272 Kan. 894, Syl. ¶ 23, 40 P.3d 139 (2001) (purpose of opening statement to assist jury in understanding expected evidence; attorneys given reasonable latitude to state facts expected to be proved). In addition, the objection by J. Carr's counsel that the opening statement was unsupported by evidence was virtually impossible to sustain at that stage of the case, when all evidence was yet to be admitted.

R. Carr's counsel continued to discuss the involvement of J. Carr and the third unknown man in the Birchwood crimes, finally observing that "the Birchwood address is replete with Jonathan Carr's DNA . . Ultimately, the DNA evidence will show that

Jonathan Carr, not Reginald Carr, Jonathan Carr committed most, if not all of the crimes which are alleged in the complaint and that he did it with a third black male who still walks the streets of Wichita."

At this point the State objected, and Judge Clark sustained the objection, saying, "It's an improper comment."

During that day's lunch break, outside the presence of the jury, the State argued that the opening statement by counsel for R. Carr had violated rulings on motions in limine and that he should be sanctioned for misconduct. The prosecutor also asked the judge to instruct the jury to disregard the statement. J. Carr moved for a mistrial. The grounds his counsel advanced in support of the motion, although abbreviated, were exactly the same as those advanced in support of J. Carr's multiple motions for severance: The defenses of J. Carr and R. Carr were mutually and irreconcilably antagonistic.

When examining an appellate claim arising out of denial of a mistrial, we review the district judge's decision for an abuse of discretion. *State v. Waller*, No. 106,102, 299 Kan. __, __ P. 3d __ (filed June 6, 2014). "'[T]he party alleging the abuse bears the burden of proving that his or her substantial rights to a fair trial were prejudiced.' *State v. Angelo*, 287 Kan. 262, 283, Syl. ¶ 16, 197 P.3d 337 (2008) (citing *State v. White*, 284 Kan. 333, 161 P.3d 208 [2007])." *State v. Leaper*, 291 Kan. 89, 96-97, 238 P.3d 266 (2010). We first ask whether the district judge abused his or her discretion when deciding whether there was a fundamental failure in the proceedings. If so, we then examine whether the district judge abused his or her discretion

when deciding whether the problematic conduct resulted in prejudice that could not be cured or mitigated through jury admonition or instruction, resulting in an injustice. *State v. Harris*, 293 Kan. 798, 814-15, 269 P.3d 820 (2012).

Having already held that defense motions for severance of the guilt phase should have been granted, we also hold that Judge Clark abused his discretion by failing to recognize a fundamental failure in the proceedings when R. Carr's counsel made his remarks during opening statement. Those remarks made the irreconcilable antagonism of the codefendants' cases inescapably clear. However, also in line with the majority view on severance, we further hold that there was no abuse of discretion in refusing to grant a mistrial to cure that failure.

At the time R. Carr's counsel wrapped up his opening statement, the jury was immediately told that his remarks were "improper." No evidence to support the third-party theory of the case was ever introduced. And, ultimately, the jury received the usual instruction that statements of counsel are not evidence. Under these circumstances, we do not discern enough additional damage to J. Carr's case attributable to the opening statement by R. Carr's counsel—*i.e.*, any damage beyond that J. Carr's case already was bound to suffer because of the denial of severance—to persuade us that all of his convictions must be reversed.

J2. Confrontation Rights under Section 10 of Kansas Constitution Bill of Rights

Like R. Carr, J. Carr challenges the admission of Walenta's statements under the Sixth Amendment and the Confrontation Clause. We have fully discussed those arguments in Section 6 of the R. Carr opinion and need not revisit them here. J. Carr also invoked Section 10 of the Kansas Constitution Bill of Rights in support of his position on this issue, and it is that invocation that prompts us to make a brief response in this opinion.

We have not previously differentiated the rights of a defendant protected by the Sixth Amendment and those protected by Section 10. See *State v. Brown*, 285 Kan. 261, 282, 173 P.3d 612 (2007). And we need not do so here. We leave the merits of any argument under Section 10 to the next case.

J3. Sufficiency of Evidence on Walenta Felony Murder

J. Carr challenges the evidence supporting his conviction of Walenta's felony murder as insufficient, arguing that impermissible inference stacking was required in order for the jury to convict.

Additional Factual and Procedural Background

Count 51 in the amended complaint charged both defendants with first-degree felony murder of Walenta while committing or attempting to commit the inherently dangerous felony of aggravated robbery.

Summarized for ease of reference, the evidence showed Walenta was approached by a black male

shortly after she pulled into her driveway about 9:40 p.m. on the evening of December 11, 2000. Walenta saw the man get out of a light-colored four-door car that had followed her and then parked near her house. The man indicated in some way that he needed assistance, and Walenta rolled down her driver's-side window a few inches to talk to him. As soon as she did so, the man stuck a black handgun into the car, holding it palm down and pointing it at her head. When she attempted to put her Yukon in reverse to get away, the man shot her three times. He then ran away and the light-colored car pulled away. Walenta said she was not sure whether the gunman had been left behind by whoever was driving the light-colored car.

Later on the evening of December 11, about 11:15, J. Carr showed up at Adams' house. Adams testified in pertinent part:

"Q. Do you remember what he was driving?

"A. I think he was dropped off that night and his brother came back to pick him up.

"Q. And so you are not sure of the vehicle?

"A. The Camry, it would have been the [light-colored four-door] Camry.

"Q. Okay. So when his brother returned, did you see him to the door?

"A. No, I don't think so.

"Q. Do you recall whether you saw the Camry the early morning hours of the 12th?

"A. No, I don't, no."

Adams also testified that J. Carr had a black handgun with him on the same night, which he left with her. Late the next day he asked her to return the gun to him, scolded her for touching it too much, and then proceeded to clean it and every bullet in it thoroughly. Adams identified the black Lorcin at trial as the gun J. Carr had with him on the night of December 11, 2000.

A few days later, after J. Carr and R. Carr had been arrested in the wake of the Birchwood crimes, Walenta picked two pictures out of a photo array as representative of the general appearance of the man who had shot her. One of those pictures was of R. Carr. She also said that the eyes of the man in the photo of R. Carr represented what she remembered of the gunman's eyes. She did not see anyone else at the scene of the shooting and was not able to pick any photo from an array containing a photo of J. Carr.

Ballistics expert testimony established that the black handgun used in the shooting of Walenta was the same black Lorcin .380 used to shoot out Schreiber's tire and to murder the four friends from the Birchwood home.

J. Carr was acquitted on the four charges arising out of the Schreiber incident and convicted on all charges against him arising out of the Walenta and Birchwood incidents.

Evidence Sufficiency

Our standard of review on sufficiency claims is often stated and familiar:

> "When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, examined in the light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. [Citations omitted.] While the State must sustain its burden of proof on each element of an offense charged, circumstantial evidence and the logical inferences therefrom are sufficient to support a conviction of even the most serious crime. [Citations omitted.] If an appellate court holds that evidence to support a conviction is insufficient as a matter of law, the conviction must be reversed; and no retrial on the same crime is possible. See *Burks v. United States,* 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (double jeopardy precludes second trial once appellate court reverses for insufficient evidence); *State v. Houck,* 240 Kan. 130, 135-36, 727 P.2d 460 (1986) (conviction reversed without remand, where evidence did not support conviction of offense charged)." *State v. Scott*, 285 Kan. 366, 372, 171 P.3d 639 (2007).

In addition, appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations. *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011).

We do not agree with J. Carr that his conviction of Walenta's felony murder required inference to be stacked upon inference.

Walenta saw the gunman emerge from the passenger seat of the light-colored car, and she saw the car pull away from its parking place immediately after the shooting. A juror need only make one inference from these facts to arrive at a finding that there was another person driving the car that followed her. Adams testified that J. Carr was with his brother on the night of the crime. Adams' testimony on whether she ever saw J. Carr in the company of R. Carr on the night of December 11 is ambiguous; she may have seen them together, but she may not have. Regardless, she had many ways of knowing they had been together. Her testimony on that point was not ambiguous or unclear, and it placed J. Carr with R. Carr not long after Walenta was shot. This testimony did not require the jury to draw an inference at all. Adams' testimony on the car J. Carr and R. Carr would have been using was equally clear. The phrasing of the questions put to her gave her every opportunity to say that she was unsure; she did not. This testimony, again, did not require any inference to be stacked on any other inference. Finally, J. Carr's possession of the black gun later identified as the Walenta murder weapon also was clear. He had it in his possession on December 11, 90 minutes after Walenta's shooting; he gave it to Adams; he took it back from her on December 12; he was unhappy that she had been handling it, and he cleaned it and the bullets it held—remarkably thoroughly. These were direct observations of Adams. No inference of any kind was required.

What was required was the jury's willingness to be persuaded of J. Carr's guilt on circumstantial evidence. This is expressly allowed under Kansas law. See *State v. Lowrance*, 298 Kan. 274, Syl. ¶15, 312 P.3d 328

(2013) (even most serious of crimes may be proved by circumstantial evidence). Circumstantial proof is still proof. It is not equivalent to impermissible inference-stacking. It can rise to the level of beyond a reasonable doubt.

Particularly when we view the evidence in the light most favorable to the prosecution, we conclude the evidence in this case was sufficient to convict J. Carr of Walenta's murder. This conclusion is reinforced by our recent decision in *State v. McBroom*, 299 Kan. __, ___, 325 P.3d 1174 (2014), in which we held that evidence of the defendant's participation in a string of burglaries with a friend could be relied upon by a jury to find he also participated in a burglary/homicide that was apparently committed by more than one person in the same general area and time frame. In this case, the evidence against J. Carr on the Birchwood incident would naturally have reinforced the evidence on the Walenta incident.

J4. Accomplice Culpability for Codefendant's Sex Crimes

J. Carr also challenges his conviction as an aider and abettor of R. Carr's rape and aggravated criminal sodomy of Holly G.

We fully discussed the mirror image of this challenge in our opinion on the R. Carr appeal, in Section 16. There we ruled that R. Carr could be found guilty as an aider and abettor of J. Carr's sex crimes against Holly G. and Heather M., even though R. Carr was out of the Birchwood home on a trip with a victim to one or more ATMs or in another room when the crimes occurred. The all-night joint enterprise of the

Birchwood intruders was plainly and repeatedly demonstrated by the State's evidence, particularly Holly G.'s lengthy and detailed testimony. Under the standard of review recited in the previous section of this opinion, we have no hesitation in holding that the evidence J. Carr aided and abetted R. Carr's rape and aggravated criminal sodomy of Holly G. was sufficient. See *State v. Pratt*, 255 Kan. 767, 773, 876 P.2d 1390 (1994) (aider and abettor need not be physically present when crime committed; sufficient evidence to support defendant's attempted rape conviction).

CONCLUSION FOR GUILT PHASE

For the reasons set forth above and in the opinion filed today in R. Carr's appeal, *State v. Carr*, 299 Kan. ___, ___, ___ P.3d ___ (2014), we affirm J. Carr's capital murder conviction under Count 2. We reverse his three remaining capital murder convictions based on the alternative theories under K.S.A. 21-3439(a)(4) and (a)(6).

We affirm J. Carr's convictions on Counts 9 through 24. Because four pairs of these counts were charged in the alternative, this results in affirmance of 12 rather than 16 convictions.

The convictions based on Counts 25, 26, and 29 through 40 are void for lack of subject matter jurisdiction. We affirm the convictions based on Counts 27 and 28. We affirm J. Carr's conviction on Count 41. We reverse his conviction on Count 42 because it is multiplicitous with Count 41.

We affirm J. Carr's convictions on Counts 43 through 55.

PENALTY PHASE

The general factual and procedural background for the penalty phase issues in this case is set out in full in the R. Carr opinion. We need not repeat it or supplement it here. In addition, nearly all penalty phase legal issues raised by J. Carr are discussed as needed and disposed of in the R. Carr opinion. We therefore merely list them with accompanying short responses.

P1. Did the district judge err in refusing to sever the penalty phase of defendants' trial? A majority of six members of the court answers this question yes for reasons explained in Section P1 of the R. Carr opinion and because of the family circumstances argument raised by J. Carr. The majority also relies on the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase. One member of the court dissents and writes separately on this issue. A majority of six members of the court agrees that this error requires J. Carr's remaining death sentence to be vacated, consistent with Section P1 of the R. Carr opinion. One member of the court dissents and writes separately on this issue.

P2. Despite compliance with K.S.A. 21-4624(a), was it constitutional error to omit the four aggravating circumstances asserted by the State from the complaint? To provide guidance on remand, the court unanimously answers this question no for reasons explained in Section P2 of the R. Carr opinion.

P3. Did the four aggravating circumstances asserted by the State adequately channel the jury's discretion in arriving at the sentence of death? To provide guidance

on remand, the court unanimously answers this question yes for reasons explained in Section P3 of the R. Carr opinion.

P4. Does the unavailability of a transcript of the jury view deprive J. Carr of a meaningful opportunity for appellate review of his death sentence? To provide guidance on remand, the court unanimously answers this question no for reasons explained in Section P4 of the R. Carr opinion.

P5. Does K.S.A. 21-4624(c)'s allowance of testimonial hearsay (a) offend the heightened reliability standard applicable in death penalty cases, or (b) violate the Confrontation Clause of the United State Constitution and *Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)? To provide guidance on remand, the court unanimously answers the first question no for reasons explained in Section P5 of the R. Carr opinion. To provide further guidance on remand, the Court unanimously answers the second question yes for reasons explained in Section P5 of the R. Carr opinion.

P6. Did the district judge err in excluding mitigating evidence of (a) likelihood of parole, or (b) the anticipated impact of J. Carr's execution? To provide guidance on remand, the court unanimously answers the first question no for reasons explained in Section P6 of the R. Carr opinion. To provide further guidance on remand, in Section P6 of the R. Carr opinion, the court discusses the standard that should govern consideration if the second question arises again.

P7. Did the district judge err by permitting the State's rebuttal witness to testify that he had consulted

other experts and that they agreed with his opinion? To provide guidance on remand, in Section P7 of the R. Carr opinion, the court discusses the standard that should govern consideration if this question arises again.

P8. Did the district judge err in denying an opportunity for surrebuttal testimony? For reasons explained in Section P8 of the R. Carr opinion, the court unanimously agrees that the district judge abused his discretion. The court declines to reach the issue of harmlessness because of the necessity of remand.

P9. Must J. Carr's sentencing on his noncapital convictions have occurred before the penalty phase of his trial, and, if so, should the jury have been informed of the sentences he would serve if he were not sentenced to death? For reasons explained in Section P9 of the R. Carr opinion, the court declines to reach the merits of the first part of this question because it is moot and, to provide guidance on remand, unanimously answers the second part of the question no.

P10. Did the district judge err in failing to instruct the jury that the existence of mitigating factors need not be proved beyond a reasonable doubt? To provide guidance on remand, for reasons explained in Section P10 of the R. Carr opinion, a majority of five members of the court answers this question yes. Two members of the court dissent, and one of them writes separately for the two on this issue.

P11. Did the district judge err by failing to instruct jurors that "the crime" to be considered when evaluating aggravating circumstances was capital

murder? In Section P11 of the R. Carr opinion, we discuss this issue to provide guidance on remand.

P12. Was the jury instruction on the role of mercy clearly erroneous? To provide guidance on remand, for reasons explained in Section P12 of the R. Carr opinion, the court unanimously answers this question no.

P13. Did the wording of Instruction 10, when read with the verdict forms, misstate the law on the need for jury unanimity on mitigating factors not outweighing aggravating factors? To provide guidance on remand, for reasons explained in Section P13 of the R. Carr opinion, the court unanimously answers this question yes.

P14. Must J. Carr's death sentence be vacated because a fact necessary to imposition of the penalty—his age of 18 or older at the time of the capital crimes—was not submitted to the jury or found beyond a reasonable doubt? For reasons explained in Section P14 of the R. Carr opinion, the court declines to reach the merits of this issue because the situation that prompted it is unlikely to arise again on remand.

P15. Does K.S.A. 21-3205 authorize punishing an aider and abettor the same as a principal? In Section P16 of the R. Carr opinion, the court declines to reach the merits of this issue because the record on appeal does not demonstrate that R. Carr was convicted of capital murder as an aider and abettor. This is also true of J. Carr, and no further discussion of the issue is warranted in this opinion.

P16. Is the death penalty an unconstitutionally disproportionate punishment as applied to aiders and

abettors of capital murder under Section 9 of the Kansas Constitution Bill of Rights? In Section P17 of the R. Carr opinion, the court declines to reach the merits of this issue because the record on appeal does not demonstrate that R. Carr was convicted of capital murder as an aider and abettor. This is also true of J. Carr, and no further discussion of the issue is warranted in this opinion.

P17. Was the penalty phase infected by prosecutorial misconduct? J. Carr argues that one prosecutor's multiple references to his unadjudicated criminal conduct and his jailhouse bragging about shooting the Birchwood victims and the crude reason for raping one of the female victims were misconduct. Even though one such reference during closing argument was the subject of a successful objection and an order for the jury to disregard it, J. Carr argues the damage was incurable. Defense counsel's earlier objection suggesting that the prosecutor could not refer to such material without being able to "prove it up" had been overruled. This objection probably should have been sustained by Judge Clark. See *State v. McCaslin*, 291 Kan. 697, Syl. ¶ 12, 245 P.3d 1030 (2011) (prosecutor, once challenged, must demonstrate good faith basis for facts underlying questions, argument). For reasons explained in Section P18 of the R. Carr opinion, the court declines to reach the further merits of this issue because the situations that prompted it are unlikely to arise again on remand.

P18. Do verdict forms such as those used in this case pose a threat of double jeopardy? For reasons explained in Section P19 of the R. Carr opinion, the

court declines to reach the merits of this issue because it is unripe.

P19. Does Kansas' execution protocol protect against unnecessary pain? For reasons explained in Section P20 of the R. Carr opinion, the court declines to reach the merits of this issue because it is unripe.

CONCLUSION FOR PENALTY PHASE

Because the district judge's failure to sever the penalty phase of defendants' trial violated J. Carr's Eighth Amendment right to an individualized sentencing determination and cannot be deemed harmless error, the death sentence for J. Carr's remaining K.S.A. 21-3439(a)(6) conviction for the murders of Heather M., Aaron S., Brad H., and Jason B. is vacated. The case is remanded to the district court for further proceedings consistent with this opinion.

* * *

BEIER, J., concurring in part and dissenting in part: I respectfully dissent from two of the majority's rulings on the guilt phase of Jonathan Carr's trial: cumulative error and sufficiency of evidence on Count 41.

As discussed in my separate opinion in Reginald Carr's appeal, *State v. Carr*, 299 Kan. __, ___ P.3d ___ (No. 90,044, this day decided) (Beier, J., concurring in part and dissenting in part), two of the district judge's errors—failure to sever the guilt phase of the defendants' trial and rejection of the reverse *Batson* peremptory challenge—may have been reversible standing alone. Even if the court is unwilling to go that far today, when these two errors are considered with the six other J. Carr errors upon which the court

unanimously agrees—erroneous instructions on the sex-crime based capital murders, multiplicity of the multiple-homicide based capital murders, lack of subject matter jurisdiction for the victim-on-victim sex charges, automatic exclusion of expert testimony on the reliability of eyewitness identifications, erroneous instruction on eyewitness certainty, and erroneous instruction on aiding and abetting—and Judge Paul Clark's refusal to grant J. Carr's motion for mistrial after opening statements, reversal of all of J. Carr's convictions under the cumulative error doctrine is unavoidable. Despite weighty evidence, there was simply too much pervasive and interrelated error in the guilt phase of J. Carr's trial for me to be confident in the outcome.

I also would hold, for the reasons stated in my separate opinion in the R. Carr appeal, that the evidence supporting Holly G.'s digital self-rape under Count 41 was insufficient to convict J. Carr as a principal. This would mean that Count 42 can stand, rather than being reversed as multiplicitous.

LUCKERT, and JOHNSON, JJ., join the foregoing concurring and dissenting opinion.

* * *

JOHNSON, J., concurring in part and dissenting in part: I join the separate opinion authored by Justice Beier, but I write separately because I believe that the district court erred in refusing to change the venue of the trial and that this defendant's felony murder conviction should be reversed for want of sufficient evidence.

The district court ignored statistically valid evidence that prejudice against the defendant was pervasive throughout Sedgwick County to the extent that one could not expect to find an unbiased jury pool in that community. My rationale in this case is the same as set forth in my separate opinion in codefendant Reginald Carr's opinion, which I adopt here by reference. See *State v. Carr*, 299 Kan. ___, ___, ___ P.3d ___ (2014) (No. 90,044, this day decided) (Johnson, J., concurring in part and dissenting in part).

Specific to this case, however, I cannot find in the record sufficient competent evidence from which a rational jury could have found J. Carr guilty beyond a reasonable doubt of the felony murder of Linda Ann Walenta. Instead of basing its prosecution upon proven facts and the relevant inferences that could reasonably be drawn from those *proven* facts, the State relied on speculation as to what might have happened. *Cf. State v. Spear*, 297 Kan. 780, 791, 304 P.3d 1246 (2013) (quoting *United States v. Spirk*, 503 F.3d 619, 623 [7th Cir. 2007]) (acknowledging that "many courts have observed that '[a] guess is not proof beyond a reasonable doubt'").

As with the change of venue issue, the sufficiency of the evidence issue involves the defendant's constitutionally guaranteed individual rights. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove, beyond a reasonable doubt, each and every element necessary to constitute the crime charged. *State v. Gould*, 271 Kan. 394, 411, 23 P.3d 801 (2001). While that right emanates from the "people's document," the constitution, its enforcement will not always be

publicly applauded. Nevertheless, it is incumbent upon this court to make the State comply with its constitutional burden of proof, without regard to the popularity of the result.

As the majority notes, the defense complains of impermissible "inference-stacking." Slip op. at 33. This court has previously tried to explain that prohibition by stating that "inferences may be drawn only from facts established," that is, inferences may not rest upon another inference. *State v. Williams*, 229 Kan. 646, 649, 630 P.2d 694 (1981). But here, the majority appears to focus on its notion of the difference between direct evidence and circumstantial evidence, which leads it to recite the familiar mantra that even the most serious crime may be proved by circumstantial evidence. Then, the majority declares that circumstantial proof is not the same as impermissible inference-stacking. Slip op. at 37.

Certainly, I cannot quibble with the notion that just because the State's case is based on circumstantial evidence does not mean that the State is relying on impermissible inference-stacking. But that statement does not answer the question presented here. We are looking at the quality of the evidence, rather than the type of evidence. To support a conviction, the evidence must be *competent* evidence, even if it is circumstantial in nature. In *Williams*, 229 Kan. at 648, we noted that "[c]onvictions based upon circumstantial evidence can present a special challenge to the appellate court" when reviewing the sufficiency of the evidence because we only permit juries "to draw *justifiable* inferences from proven circumstances and established facts." *Williams* set forth an alternative explanation of the

prohibited practice of inference-stacking by specifically placing it in the context of circumstantial evidence: "'[W]here reliance is placed upon circumstantial evidence, the circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances.'" 229 Kan. at 649 (quoting 1 Wharton's Criminal Evidence § 91, pp. 150-51 [13th ed. 1972]). Here, to get to the circumstances that would support a reasonable inference that the defendant committed the crime of felony murder, one has to make presumptions and inferences from other circumstances.

When reviewing whether the record contains substantial competent evidence, I find it helpful to first review what elements or claims the State was required to prove in order to obtain a constitutional conviction on the charged crime. As noted, the charged crime was felony murder, the definition of which is located in the first-degree murder statute and requires "the killing of a human being committed in the commission of, attempt to commit, or flight from an inherently dangerous felony as defined in K.S.A. 21-3436 and amendments thereto." K.S.A. 21-3401(b). In this case, the State alleged that the underlying felony was an attempt to commit aggravated robbery upon Walenta. "Robbery is the taking of property from the person or presence of another by force or by threat of bodily harm." K.S.A. 21-3426. That crime is an aggravated robbery if the robber is armed with a dangerous weapon or inflicts bodily harm upon a person during the robbery. "An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration

thereof or is prevented or intercepted in executing such crime." K.S.A. 21-3301(a).

But the State did not allege that J. Carr killed Walenta or that he attempted to rob her. Rather, the State's felony-murder prosecution of J. Carr was based on the theory that he aided and abetted his brother, R. Carr, who was the person that killed Walenta while attempting to rob her. K.S.A. 21-3205(1) provides that "[a] person is criminally responsible for a crime committed by another if such person *intentionally* aids, abets, advises, hires, counsels or procures the other to commit the crime." (Emphasis added.) To be criminally responsible, a defendant must aid and abet the principal either before or during the commission of the crime and, most importantly, the aider and abettor must possess the intent to promote or assist in the commission of the charged crime. PIK Crim. 3d 54.05. Mere association with the principal who actually committed the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider and abettor. *State v. Green*, 237 Kan. 146, 149, 697 P.2d 1305 (1985); see Comment, PIK Crim. 3d 54.05. In other words, one is not criminally responsible for accidentally aiding and abetting the commission of a crime; the defendant has to know that the principal is going to commit the charged crime and possess the same criminal intent as the principal in order to be convicted of that crime as an aider and abettor.

With the foregoing in mind, the prosecutor's theory of prosecution in this case required the State to prove to the jury beyond a reasonable doubt that J. Carr intentionally drove R. Carr to the site of the crime, with the intent to promote or assist R. Carr in taking

property from Walenta by force or by threat of bodily injury while armed with the handgun that J. Carr may or may not have provided, and that during the armed robbery attempt, R. Carr killed Walenta.

The obvious first hurdle for the prosecution was that it had absolutely no proof that R. Carr was attempting an aggravated robbery when he shot Walenta, rather than attempting a kidnapping or even murder. If his brother was not attempting an aggravated robbery, then J. Carr could not have been criminally responsible for felony murder based on aiding and abetting a nonexistent underlying felony. Nevertheless, I will continue the analysis as if R. Carr was attempting an aggravated robbery.

At this point, it might be helpful to briefly discuss the difference between circumstantial evidence and direct evidence. The dictionary definition of "direct evidence" is particularly germane here because it also places the term in the context of an inference or presumption, to-wit: "Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." Black's Law Dictionary 675 (10th ed. 2014). Ironically, the majority provides an excellent example of the difference.

After describing Walenta's personal observation that the gunman emerged from the passenger seat of a light-colored car which pulled away from its parking place immediately after the shooting, the majority declares that "[a] juror need only make one inference from these facts to arrive at a finding that there was another person driving the car that followed her." Slip op. at 36. Walenta's statement of what she personally

knew from her own observation was direct evidence of the following facts: The gunman exited from the passenger side of a vehicle; the vehicle was light-colored; and the vehicle pulled away from its parking place immediately after the shooting. One need draw no inference or make any presumption for those facts to be established. But the conclusion that someone other than the gunman was the driver of the vehicle is circumstantial evidence. It is only proved by inferring or presuming from Walenta's direct testimony that if the gunman was the only person in the vehicle, it could not have pulled away without the gunman being in the vehicle.

But, of course, the direct evidence from Walenta does not establish the elements of felony murder against J. Carr. The only other persons who were in a position to personally observe the crime and have personal knowledge of any fact that would not require an inference or presumption for proof are the gunman and vehicle driver, alleged to be R. Carr and J. Carr. Neither brother testified or gave a statement admitting that J. Carr drove the car to assist R. Carr in an armed robbery. Even the permissible inference from direct evidence that the majority points out—that someone other than the shooter was driving the car—is insufficient to prove the elements of felony murder outlined above. To get to the elements of the crime, one will need more circumstantial evidence from which to draw reasonable inferences.

In my view, a circumstance that was absolutely essential for the prosecution to establish to permit a rational jury to convict J. Carr of felony murder based upon the State's theory of prosecution was that J. Carr

was driving the light-colored car that Walenta observed. But that circumstantial evidence—that J. Carr was driving the light-colored car—was not established with proven facts. There was no witness that identified J. Carr as the vehicle driver. No witness even saw the driver to be able to provide a description that could be matched against J. Carr.

The only way to establish that J. Carr was driving the car used in the crime is to presume that circumstance based upon other circumstantial evidence. For instance, Tronda Adam's testimony placing J. Carr with R. Carr not long after Walenta was shot is not direct evidence that they were together during the shooting. Contrary to the majority's characterization, that testimony was circumstantial because Adams did not personally observe the brothers commit the crime together. To be relevant to J. Carr's prosecution for felony murder, the jury had to infer that, if the brothers were together after the shooting, they must have been together during the shooting. Then, from the circumstance that the brothers were together during the shooting, the jury would need to infer that J. Carr was driving the light-colored car at the scene of the crime. From the circumstance that J. Carr was driving the vehicle at the scene of the crime, the jury would have to infer that he was doing so in order to knowingly promote or assist his brother in the commission of a crime. And because the State said so, the jury would need to infer or presume that the intended crime was aggravated robbery, rather than some other crime such as kidnapping. If that is not inference-stacking, I must confess that the concept must be incomprehensible to me.

Likewise, the testimony describing the vehicle the brothers were using the day of the shooting required further presumptions and inference-stacking by the jury, notwithstanding the majority's emphatic denial that it did. Adams did not see the brothers in the car together at the scene of the Walenta killing. Therefore, her testimony did not prove a fact that was relevant to the felony-murder elements without a further inference or presumption, *i.e.*, it was not direct evidence. Pointedly, no witness provided information, such as a license tag number, from which the owner of the light-colored car at the crime scene could be determined. No one even described the make and model of the car carrying the gunman. All the jury could do with Adams' testimony was to speculate that the light-colored car observed by Walenta was the same car that Adams saw the brothers in at other times and further infer that the brothers were still together in that car at the crime scene, and further presume that the unseen driver of the light-colored car at the scene of the crime was J. Carr, who presumably was knowingly assisting his brother in committing an aggravated robbery.

Likewise, Adams' testimony about the gun does nothing to boost the State's case. Her "direct observations" about what transpired with the weapon at times other than the shooting, provides absolutely no insight into the elements of the felony-murder charge, unless the jury simply guesses that J. Carr must have given the weapon to R. Carr and then presume that, in doing so, J. Carr knew that R. Carr was planning to use the weapon to commit an aggravated robbery.

Even if one eschews the term "inference-stacking," I cannot find that the jury had sufficient proven circumstances and established facts to justify an inference that J. Carr aided and abetted the felony murder of Walenta. Without sufficient competent evidence to support a constitutionally valid conviction, this court has no choice but to reverse the conviction.

Before concluding, however, I want to briefly discuss my worst nightmare, *i.e.*, that our inference-stacking, guilt-by-association, character-propensity-reasoning decision in *State v. McBroom*, 299 Kan. ___, 325 P.3d 1174 (2014), would be applied beyond its facts as establishing precedent for upholding convictions based upon insufficient evidence. The majority cites to *McBroom* to support its declaration that "the evidence against J. Carr on the Birchwood incident would naturally have reinforced the evidence on the Walenta incident." Slip op. at 37. Why do I find that reasoning faulty? Let me count the ways.

First, I would find that it would be quite *unnatural* for the jury to use the evidence on one charge to reinforce or influence its decision on another charge, because the trial judge specifically told the jurors not to do that. PIK Crim. 3d 68.07, which the judge followed in jury instruction No. 3, instructs a jury as follows:

> "Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime

> charged must be stated in a verdict form signed by the Presiding Juror."

Second, as noted above, mere association with a principal actor is insufficient to establish criminal responsibility as an aider and abettor, even if the defendant is also merely present at the crime scene. Accordingly, guilty-by-association at another crime scene cannot comport with the constitutional requirement for the State to prove each and every element of the charged crime beyond a reasonable doubt.

Third, we at least pay lip service to the notion that juries should not be permitted to convict a defendant based upon character propensity reasoning. See Comment, *Other Misconduct Evidence: Rethinking Kansas Statutes Annotated Section 60-455*, 49 Kan. L. Rev. 145, 146 (2000).

> "In the criminal context, the State cannot present evidence that a defendant committed a specific bad act on another occasion solely to establish a bad character propensity as proof that the defendant must have committed the currently charged crime, *i.e.*, defendant did bad before, therefore defendant must have done bad now." *State v. Coburn*, 32 Kan. App. 2d 657, 671-72, 87 P.3d 348 (Johnson, J., concurring), *rev. denied* 278 Kan. 848 (2004).

That is precisely the reasoning the majority is using; J. Carr did bad at the Birchwood incident so he must have done bad at the Walenta incident.

Fourth, "[u]nder our theory of criminal jurisprudence in this nation, the defendant is clothed

with a presumption of innocence until he is proven to be guilty beyond a reasonable doubt by the State." *Williams*, 229 Kan. at 663-64. Allowing the State to use evidence of one crime to "reinforce" its proof of another crime denigrates the defendant's presumption of innocence. In other words, presuming that a defendant did the charged crime because there is evidence that he committed another crime sounds more like bad people are clothed with a presumption of guilt.

Fifth, as I noted above, the State is constitutionally required by the Fourteenth Amendment to prove each and every element necessary to constitute the *charged crime* beyond a reasonable doubt. Allowing the State's proof of the charged crime to rely on its having proved another crime reduces its constitutional burden of proof and violates the defendant's right to due process.

Finally, it is no answer to say that the jury has spoken and an appellate court should not interfere with that decision. To the contrary, our failure to interfere when presented with a constitutional violation is an abdication of our role in the justice system. The jury is a factfinder; it is not charged with the responsibility (or authority) to decide constitutional questions. Where the jury's factfinding exceeds constitutional boundaries, such as where it convicts a defendant for the charged crime based upon evidence that the defendant committed another crime, this court must rectify the violation.

In sum, the defendant's conviction for felony murder was unsupported by substantial competent evidence and should be reversed.

* * *

BILES, J., concurring in part and dissenting in part: I agree Jonathan Carr's sentencing must be reversed and remanded for new proceedings because the district court failed to sever the cases following the convictions. I write separately to note my disagreement with the majority's dicta in which it adopts a section in Reginald Carr's opinion entitled "P10. Burden of Proof on Mitigating Factors." Slip op. at 378. The majority holds J. Carr's sentence was imposed in violation of the Eighth Amendment to the United States Constitution because the district court failed to explicitly instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt. I disagree.

As noted in more detail in my dissent in *State v. Gleason*, No. 97,296, 299 Kan. ___, ___ P.3d ___ (filed July 18, 2014) (slip op. at 100), the majority's conclusion defies the United States Supreme Court's established Eighth Amendment jurisprudence and lacks any persuasive analysis articulating why the circumstances in this case justify a departure from that precedent. The issue for Eighth Amendment purposes is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). The majority's conclusion is that a per se violation of the Eighth Amendment occurs if a jury instruction correctly states that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt but fails to affirmatively state that mitigation evidence need not be proven beyond a reasonable doubt.

But this alone cannot justify reversal under controlling Eighth Amendment precedent. See *Kansas v. Marsh*, 548 U.S. 163, 173, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006); *Walton v. Arizona*, 497 U.S. 639, 651, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); see also *Smith v. Spisak*, 558 U.S. 139, 130 S. Ct. 676, 175 L. Ed. 2d 595 (2010) (instructions and jury forms at penalty phase did not violate Eighth Amendment by requiring jury unanimity as to existence of mitigating factors; instructions and forms did not explicitly advise jury mitigating circumstances need not be unanimously found). The next step must be to decide in the absence of the instruction whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. The majority is wrong when it cuts the analysis short and concludes the failure to simply instruct the jury on mitigation forces an automatic reversal. Slip op. at 378.

The Eighth Amendment does not compel our directive in *State v. Kleypas*, 272 Kan. 894, 1078, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002), that any mitigating circumstance instruction must inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt. See *Marsh*, 548 U.S. at 173 (holding *Walton* compelled conclusion Kansas capital sentencing scheme satisfied Eighth Amendment requirements because Kansas scheme was functionally identical to scheme found constitutional in *Walton*, except it provided benefit to defendants by placing no evidentiary burden on them). A finding that J. Carr's jury instructions did not conform to the *Kleypas*

requirement is not an adequate basis for concluding J. Carr's federal Eighth Amendment rights were violated and reversal is required.

I dissent from that portion of the opinion.

MORITZ, J., joins the dissenting portion of the foregoing concurring and dissenting opinion.

* * *

MORITZ, J., concurring in part and dissenting in part: I write separately for several reasons, all of which are fully explained in the Reginald Carr appeal, *State v. Carr*, 299 Kan. ___, ___ P.3d ___ (No. 90,044, this day decided). Rather than repeat that full explanation here, I will simply summarize those points on which I concur with and dissent from the majority opinion.

First, I concur because while I agree with the majority's decision to affirm Jonathan Carr's convictions, including one capital murder conviction, I disagree with the majority's conclusion that the district court abused its discretion in refusing to sever the defendants' guilt phase trial. Even considering the joinder as error, however, I believe the majority properly finds any errors in the conviction phase harmless and Jonathan Carr's cumulative error argument unpersuasive. Therefore, I concur with the majority opinion affirming Jonathan Carr's convictions, including one capital murder conviction.

Second, and more significantly, I dissent from the majority's decision to reverse and remand Jonathan Carr's death sentence. I would find the district court did not err in refusing to sever the defendants' penalty phase trial. But even considering a joinder error in the

penalty phase, I would affirm the jury's imposition of the death penalty for Jonathan Carr. As more fully detailed in my concurring and dissenting opinion in Reginald Carr's appeal, 299 Kan. at ___, (slip op. at 410) (Moritz, J., concurring in part and dissenting in part), I am convinced the mitigating evidence simply pales in comparison to the aggravating circumstances. I would hold beyond a reasonable doubt that the jury's decision to impose the death penalty was not attributable to any joinder error below.

Additionally, I join that portion of Justice Biles' separate opinion dissenting from the majority's "alternative" holding that the district court erred in failing to instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt.

Ultimately, I am convinced Jonathan Carr received a fair trial and the jury imposed a sentence of death because it understood that the horrendous circumstances called for that sentence. Because I would affirm Jonathan Carr's death sentence, I dissent.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 90,044

[Filed July 25, 2014]

STATE OF KANSAS, *Appellee*,	)
v.	)
REGINALD DEXTER CARR, JR., *Appellant*.	)

SYLLABUS BY THE COURT

1.

The Sixth Amendment to the United States Constitution guarantees an accused in all serious criminal prosecutions the right to trial by an impartial jury. This protection is incorporated into and made applicable to the states through the due process provision of the Fourteenth Amendment. The Kansas Constitution includes a similarly worded guarantee for its citizens in Section 10 of the Bill of Rights, which recognizes a defendant's right to a speedy and public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. We have analyzed the state constitutional provision in the same way as the federal constitutional provision.

2.

K.S.A. 22-2616(1) gives Kansans a vehicle to obtain a change of venue to prevent a local community's hostility or preconceived opinion on a defendant's guilt from hijacking his or her criminal trial.

3.

Seven factors are considered relevant to evaluate whether the existence of presumed prejudice demands a change of venue: (1) media interference with courtroom proceedings; (2) the magnitude and tone of the coverage; (3) the size and characteristics of the community in which the crime occurred; (4) the amount of time that elapsed between the crime and the trial; (5) the jury's verdict; (6) the impact of the crime on the community; and (7) the effect, if any, of a codefendant's publicized decision to plead guilty.

4.

On appeal, a claim of presumed prejudice is judged by a mixed standard of review. A district judge's findings of fact on the seven relevant factors considered in determining whether presumed prejudice demands a change of venue are examined to determine whether they are supported by substantial competent evidence in the record. The district court's weighing of the factors and ultimate legal conclusion on whether presumed prejudice has been established is reviewed de novo.

5.

In this case, the district judge did not err by refusing defendant's motions to transfer venue out of Sedgwick County on the basis of presumed prejudice.

6.

In reviewing for actual prejudice from refusal to change venue, an appellate court examines whether the district judge had a reasonable basis for concluding that the jurors selected could be impartial. The crucible for determination of actual prejudice is voir dire. The judge must review the media coverage and the substance of the jurors' statements at voir dire to determine whether a community-wide sentiment exists against the defendant. Negative media coverage by itself is insufficient to establish actual prejudice.

7.

A district judge's decision on actual prejudice is reviewed under an abuse of discretion standard.

8.

In this case, all of defendant's jurors who had formed an opinion on guilt said during voir dire they could put their opinions aside. These voir dire responses gave the district judge a reasonable basis for ruling that no actual prejudice required a venue change. This case was not so extreme that the jurors' statements about their ability to be impartial cannot be credited.

9.

Under K.S.A. 22-2616(1), the burden is on the defendant to show prejudice in the community significant enough that there is a reasonable certainty he or she cannot obtain a fair trial without a venue change.

10.

Factors to be considered on whether a venue change is necessary under the Kansas statute include: (1) the particular degree to which the publicity circulated throughout the community; (2) the degree to which the publicity or that of a like nature circulated to other areas to which venue could be changed; (3) the length of time which elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the ease encountered in the selection of the jury; (5) the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; (6) the challenges exercised by the defendant in the selection of the jury, both peremptory and for cause; (7) the connection of government officials with the release of the publicity; (8) the severity of the offense charged; and (9) the particular size of the area from which the venire is drawn.

11.

The district judge did not abuse his discretion by denying defendant's motions for change of venue under K.S.A. 22-2616(1).

12.

Although two or more defendants may be charged in the same complaint, information, or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the charged crime or crimes, the court may order a separate trial for any one defendant when requested by the defendant or the prosecutor. The decision whether to sever a trial is one within the trial court's discretion.

13.

A single trial of multiple defendants may serve judicial economy and ensure consistent verdicts, but the right of a defendant to a fair trial must be the overriding consideration. Five factors are useful for an appellate court to consider in determining whether there is sufficient prejudice to mandate severance: (1) whether the defendants have antagonistic defenses; (2) whether important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial; (3) whether evidence incompetent as to one defendant and introducible against another would work prejudicially to the former with the jury; (4) whether the confession by one defendant, if introduced and proved, would be calculated to prejudice the jury against the other or others; and (5) whether one of the defendants who could give evidence for the whole or some of the other defendants would become a competent and compellable witness on the separate trials of such other defendants.

14.

A party moving for severance has the burden to demonstrate actual prejudice to the district court judge, who has a continuing duty at all stages of a trial to grant severance if prejudice does appear.

15.

On appeal from a denial of severance, the party claiming error has the burden to establish a clear abuse of discretion by the trial judge. Once abuse of discretion is established, the party benefitting from the error bears the burden of demonstrating harmlessness.

16.

The district judge abused his discretion in this case by repeatedly refusing to sever the defendant's trial from that of his codefendant brother. However, because of the overwhelming independent evidence presented by the State, the judge's failure to sever the guilt phase of the trial was harmless error.

17.

The district judge in this case did not abuse his discretion by denying defendant's motion to sever noncapital counts from capital counts. Similarity of punishment is not an indispensable attribute of crimes of same or similar character under K.S.A. 22-3202(1).

18.

K.S.A. 22-3410(2)(i) permits a district judge to remove a prospective juror for cause when his or her "state of mind with reference to the case or any of the parties" persuades the judge that there is doubt he or

she can act impartially. A criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. But this right is balanced against the State's strong interest in seating jurors who are able to apply the sentence of capital punishment within the framework provided for by the federal Constitution and state law.

19.

In this case, the district judge's excuse of prospective juror M.W. for cause was fairly supported by the record and not an abuse of discretion under K.S.A. 22-3410(2)(i). Eleven other prospective jurors to whom defendant and his codefendant brother compare M.W. expressed a willingness to follow the law, while M.W. did not.

20.

The same standard of review and legal framework applicable to a district judge's decision to excuse a prospective juror who cannot set aside his or her objection to the death penalty applies equally to decisions not to excuse prospective jurors challenged for cause based on their inability to consider a sentence other than death.

21.

The district judge's refusal to excuse four prospective jurors for cause was fairly supported by the record and not an abuse of discretion under K.S.A. 22-3410(2)(i). These four prospective jurors expressed a willingness to consider and give effect to mitigating evidence.

22.

Section 7 of the Kansas Constitution Bill of Rights provides that "[n]o religious test or property qualification shall be required for any office of public trust." This section does not provide any greater limitation than already provided under K.S.A. 43-156, which provides that "[n]o person shall be excluded from service as a grand or petit juror in the district courts of Kansas on account of religion "

23.

K.S.A. 43-156 is in some tension with K.S.A. 22-3410(2)(i) which provides that a prospective juror may be challenged for cause as unqualified to serve when he or she is partial or biased—because K.S.A. 22-3410(2)(i) requires a prospective juror who can never participate in imposition of the death penalty to be excused for cause as partial, even though his or her scruples have a basis in a religious code. Jurors cannot be discriminated against on the basis of their religious belief or lack of belief, but they can be excluded from jury service when their belief or nonbelief makes it impossible for them to act in conformance with the signature requirement of that service: impartiality under the rule of law.

24.

In this case, the district judge did not violate Section 7 of the Kansas Constitution Bill of Rights or K.S.A. 43-156 when he excused prospective jurors for cause because they had said their religious beliefs would prevent them from behaving impartially.

25.

A district judge's handling of a challenge to a criminal defendant's peremptory strike under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), involves three steps, each subject to its own standard of review on appeal. Under the first step, the party challenging the strike must make a prima facie showing that the other party exercised a peremptory challenge on the basis of race. Appellate courts utilize plenary or unlimited review over this step. If a prima facie case is established, the burden shifts to the party exercising the strike to articulate a race-neutral reason for striking the prospective juror. This reason must be facially valid, but it does not need to be persuasive or plausible. The reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The opponent of the strike continues to bear the burden of persuasion. The scope of review on a district judge's ruling that the party attempting the strike has expressed racially neutral reasons is abuse of discretion. In the third step, the district judge determines whether the party opposing the strike has carried its burden of proving purposeful discrimination. This decision is reviewed under an abuse of discretion standard.

26.

The district judge erred in this case by granting the State's challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to the defendants' peremptory strikes of the eventual presiding juror by failing to perform the necessary three steps of analysis.

27.

Each state is free to determine whether a district judge's good faith error in denying a criminal defendant's peremptory challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), is subject to review for harmlessness. In Kansas, review for harmless error applies to such error, and the district judge's error in this case does not require reversal of all of defendant's convictions, standing alone.

28.

In this case, because defendants did not object to testimony from a felony-murder victim's neighbor and husband about the victim's out-of-court statements to them, any issue based on that testimony under the Confrontation Clause or *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), was not preserved for appeal. Any error in admission of testimony from law enforcement witnesses about the victim's statements that was subject to defense objection based on the Confrontation Clause or *Crawford*, was harmless because the testimony was largely repetitive of the testimony admitted without objection.

29.

When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. A conviction for felony murder cannot stand without

sufficient evidence of one of the enumerated inherently dangerous felonies listed in K.S.A. 21-3436.

30.

The jury in this case was permitted to consider evidence against defendant on joined charges when deciding whether to find him guilty or not guilty on a charge of felony murder involving a different victim at a different time and place. Some of the evidence in support of the joined charges also was applicable to the felony murder and made the State's evidence on that crime sufficient to convince a rational factfinder of defendant's guilt beyond a reasonable doubt.

31.

Under *State v. Todd*, 299 Kan. 263, ___, 323 P.3d 829 (2014), and *State v. Gleason*, No. 97,296, 299 Kan. ___, ___ P.3d ___ (filed July 18, 2014) (slip op. at 42), defendant was not entitled to lesser included instructions for felony murder because a subsequent statutory amendment abolishing any lesser included offenses for that crime can be applied to defendant without violation of the Ex Post Facto Clause or due process.

32.

In this case, the jury instructions on capital murder under K.S.A. 21-3439(a)(4) failed to state the elements of the crime because they relied on sex-crime instructions defining the underlying sex crime for a victim other than the victim of the capital murder. In addition, three of the four counts of capital murder under K.S.A. 21-3439(a)(6) were multiplicitous with the first count. Under *Stromberg v. California*, 283 U.S.

359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931), and *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), the combination of these errors requires reversal of three of the defendant's four convictions of capital murder.

33.

The defendant's appellate claim that a special unanimity instruction was required because of a multiple acts problem on the capital murders charged under K.S.A. 21-3439(a)(4) is moot.

34.

The defendant's appellate claim that he is entitled to reversal of his convictions for sex offenses on which capital charges under K.S.A. 21-3439(a)(4) were based is moot.

35.

In this case, the State's evidence against the defendant on aggravated burglary, viewed in the light most favorable to the prosecution, was sufficient to support a reasonable factfinder's verdict of guilty.

36.

Although it is possible to prosecute a male as a principal or an aider or abettor for causing a rape or attempted rape under Kansas law, the State did not succeed in charging those crimes here; and the defendant's convictions based on coerced victim-on-victim sex acts are void because the amended complaint failed to endow the district court with subject matter jurisdiction.

37.

The State's evidence against the defendant as an aider and abettor of a victim's digital penetration of herself, viewed in the light most favorable to the prosecution, was sufficient to support a reasonable factfinder's guilty verdict on rape.

38.

In this case, the defendant's conviction as an aider and abettor of penile rape of a victim immediately after digital rape of the same victim rests on unitary conduct and must be reversed as multiplicitous.

39.

In this case, abundant evidence supported the defendant's conviction as an aider and abettor of his codefendant's sex crimes. It is not necessary that an aider and abettor be contemporaneously aware that his or her principal is committing a crime that the aider and abettor has encouraged or facilitated. It also is not necessary that an aider and abettor be in the immediate vicinity of the principal and the victim during commission of the crime.

40.

Although omission of a defendant's name from a charging document may pose a subject matter jurisdiction problem, the defendant's name was included in Count 43 charging attempted rape in this case. Any technical defect in this charge did not deprive the district court of subject matter jurisdiction.

41.

Kansas' third-party evidence rule does not prevent a criminal defendant from introducing circumstantial evidence of an uncharged person's guilt simply because the State's case against the defendant includes direct evidence. The district judge abused his discretion in excluding relevant evidence of a third party's guilt proffered by the defendant in the form of the defendant's own testimony about observations of the third party, including the third party's possession of victims' stolen property.

42.

The hearsay rule is subject to a K.S.A. 60-460(j) exception for out-of-court statements against the declarant's interest. The district judge abused his discretion in excluding the defendant's testimony about statements made by his codefendant brother that, based on the record before this court, qualified as declarations against interest.

43.

A criminal defendant is entitled to a meaningful opportunity to present a complete defense, but protection of this fundamental right is tempered by sensible control of the criminal trial process, including procedural rules and evidentiary rulings that serve legitimate interests. When a district judge excludes relevant, admissible, and noncumulative evidence integral to a defendant's theory of defense, without furthering a legitimate interest, the right to present a defense is violated.

44.

The district judge abused his discretion by excluding evidence to support the defendant's defense under a misinterpretation of the third-party evidence rule and by refusing to apply a K.S.A. 60-460(j) hearsay exception, which violated the defendant's right to present a defense. However, such a constitutional error, even when it implicates a defendant's right to testify, is subject to evaluation for harmlessness.

45.

Given the strength of the State's case against the defendant on the record before the court, the district judge's violation of the defendant's right to present a defense was not reversible, standing alone.

46.

The district judge in this case did not err by admitting evidence of the results of mitochondrial DNA testing of four hairs found at the crime scene, which narrowed the list of contributors to maternal relatives of the defendant. This was circumstantial evidence of the defendant's presence at the scene, even though more precise nuclear DNA analysis of one hair was admitted at trial and implicated his codefendant brother and not the defendant. The district court also need not have excluded the mitochondrial DNA evidence because the risk of undue prejudice outweighed its probative value.

47.

Under K.S.A. 2013 Supp. 21-5402(d), felony murder is not a lesser included offense of capital murder.

Application of this statute to a defendant whose direct appeal was pending at the time the statute took effect does not violate the Ex Post Facto Clause or due process.

48.

A district judge does not abuse his or her discretion by denying a mistrial because of an alleged discovery violation by the State, when the State was unaware of new medical evidence linking the defendant and a victim until midtrial and disclosed the evidence to the defense as soon as it surfaced. Under such circumstances, there is no discovery violation that amounts to a fundamental failure in the proceedings.

49.

It is an abuse of discretion for a district judge to automatically exclude expert testimony on the reliability of eyewitness identifications. However, on the entire record in this case, there is no reasonable probability the judge's error affected the outcome of the trial of the defendant.

50.

A jury view is nonevidentiary and not a critical stage of a criminal prosecution requiring the presence of a criminal defendant; neither the defendant's statutory nor his constitutional right to be present at all critical stages of the proceedings against him was violated by the judge's failure to ensure his presence during the jury view in this case.

51.

A jury view may occur outside of the presence of a criminal defendant's counsel without violating the Sixth Amendment or K.S.A. 22-4503.

52.

Given the cautionary eyewitness identification instruction's inclusion of "any other circumstances that may have affected the accuracy of the identification" as a catch-all factor the jury was permitted to consider, there was no error in the judge's omission of the defendant's requested language, "the race of the witness and the race of the person observed." Under the catch-all factor's broad language, counsel for the defense were free to argue any factor the evidence would support.

53.

In this case, the district judge committed error by giving both PIK Crim 3d 54.05 (Responsibility for Crimes of Another) and PIK Crim. 3d 54.06 (Responsibility for Crimes of Another—Crime Not Intended), when the defendant was charged with specific intent crimes demanding proof of premeditation. The error does not merit reversal as clear error because of the strength of the State's premeditation case.

54.

A jury instruction stating "[a] person who, either before or during its commission, intentionally aids, abets, advises, or counsels another to commit a crime with intent to promote or assist in its commission is

criminally responsible for the crime committed regardless of the extent of the person's participation, if any, in the actual commission of the crime" is adequate to communicate that the aider and abettor must personally possess the same specific intent as the principal. There was no error in this case attributable to the district judge's failure to tell the jury explicitly that the State must prove an aider and abettor's premeditation in order to convict him of capital murder or attempted first-degree premeditated murder.

55.

Omission of "by such person as a probable consequence of committing or attempting to commit the crime intended" from the end of PIK Crim. 3d 54.06 does not result in clear error because of a failure to communicate a need for causation and a measurement of probability.

56.

A prosecutor is permitted wide latitude in discussing the evidence. The prosecutor's first few dramatic sentences in her closing argument on this 58-count case did not exceed the wide latitude by inviting jurors to put themselves in the position of the victims.

57.

Cumulative error can require reversal of all of a criminal defendant's convictions even when one error standing alone does not. Cumulative error does not require reversal of all of the defendant's convictions in this case.

58.

The Eighth Amendment to the United States Constitution requires a jury to make an individualized capital sentencing determination. It does not categorically mandate separate penalty phase proceedings for each codefendant in a death penalty case. The Eighth Amendment was violated in this capital case when the district judge refused to sever the penalty phase of the proceedings; because the codefendants' mitigation cases were at least partially antagonistic; because evidence admitted in the joint penalty phase may not have been admitted in a severed proceeding; and because mitigating evidence as to one codefendant was prone to be used by the jury as improper, nonstatutory aggravating evidence against the other.

59.

The standard of review and the ultimate question that must be answered with regard to whether error in the penalty phase of a capital trial was harmless is whether the court is able to find beyond a reasonable doubt that the error, viewed in the light of the record as a whole, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances. The test is not whether a death penalty sentence would have been imposed but for the error; instead the inquiry is whether the death verdict actually rendered in this trial was surely unattributable to the error. In this case, the judge committed reversible error by refusing to sever the penalty phase of the codefendants' trial.

60.

The State's compliance with K.S.A. 21-4624(a) provides a capital murder defendant with constitutionally sufficient notice of aggravating factors.

61.

K.S.A. 2013 Supp. 21-6624's aggravators—that the defendants knowingly or purposely killed or created a great risk of death to more than one person; that they committed the crime for themselves or for another for the purpose of receiving money or any other thing of monetary value; that they committed the crime in order to avoid or prevent a lawful arrest or prosecution; and that they committed the crime in an especially heinous, atrocious, or cruel manner—are adequate to channel the jury's discretion in the penalty phase of a capital case.

62.

Due process requires a reasonably accurate and complete record of the trial proceeding in order to allow meaningful and effective appellate review. And, when a claim appears to have a substantial foundation based on the available record but the claim cannot be reviewed because of the incomplete or inaccurate transcript, the proper remedy is reversal. Still, a defendant does not have a constitutionally protected right to a totally accurate transcript of the criminal proceedings. A record that is incomplete but that involves no substantial or significant omissions does not require reversal. Appellants seeking reversal on the grounds that they are denied due process because of an inaccurate or incomplete transcript must make the best feasible showing possible that a complete and accurate

transcript might have changed the outcome of the appeal. If no such showing is made, no relief is appropriate.

63.

K.S.A. 21-4624(c) provides for a relaxed evidentiary standard during the penalty phase of a capital proceeding:

> "In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible."

64.

K.S.A. 21-4624(c)'s relaxed evidentiary standard of admission is consistent with the United States Supreme Court's all relevant evidence doctrine, which demands that a capital sentencing jury have before it all possible relevant information about the individual defendant whose fate it must determine. It provides for

an individualized inquiry and does not limit the discretion of the sentencer to consider relevant circumstances offered by the defendant. K.S.A. 21-4624(c) provides that only relevant evidence is to be admitted, thus assuring the evidence actually has probative value. Moreover, evidence secured in violation of the United States Constitution or the Kansas Constitution is inadmissible. The relaxed evidentiary standard is sufficient to protect the defendant's right to a fair trial and does not violate either the United States or Kansas Constitutions.

65.

The Sixth Amendment Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), apply in the penalty phase of a capital case and control over any contrary interpretation or application of K.S.A. 21-4624(c).

66.

In order to be admissible in a penalty phase of a capital trial, mitigating evidence must be relevant to the defendant. The district judge in this case did not abuse his discretion by excluding general testimony about parole likelihood, including an explanation of the statutory rubric and statistics on past paroles of others.

67.

Testimony about the impact of a defendant's execution must be probative on the material question of the defendant's character.

68.

A State expert's testimony about other experts' out-of-court agreement with him is subject to evaluation for admissibility under the Sixth Amendment, *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and K.S.A. 21-4624(c).

69.

Rebuttal evidence is that which contradicts evidence introduced by an opposing party. It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. Such evidence includes not only testimony that contradicts the witnesses on the opposite side, but also corroborates previous testimony. There is no inflexible legal requirement that rebuttal or surrebuttal evidence be new. A district judge who excludes surrebuttal testimony because he or she believes it will not be new abuses his or her discretion.

70.

In the absence of a request, the trial court has no duty to inform the jury in a capital murder case of the term of imprisonment to which a defendant would be sentenced if death were not imposed. Where such an instruction is requested, the trial court must provide the jury with the alternative number of years that a defendant would be required to serve in prison if not sentenced to death. Additionally, where a defendant

has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the possible terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be served consecutive to or concurrent with each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court.

71.

A district judge must instruct a penalty phase jury in a capital case not only that it need not be unanimous on the existence of a mitigating circumstance but also that a mitigating circumstance need not be proved beyond a reasonable doubt.

72.

It is inadvisable for an aggravating circumstances instruction in the penalty phase of a capital case to reference a generic crime rather than capital murder.

73.

An instruction to a jury in a penalty phase of a capital case that reads: "Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense. In this proceeding, you may consider sympathy for a defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed," is not erroneous because it equates mercy to a mitigating factor.

74.

The aggravating circumstances instruction for a penalty phase in a capital case must be corrected to be consistent with the verdict form designed to cover the situation when the jury agrees unanimously on the existence of an aggravating circumstance but cannot agree unanimously on how it weighs against any mitigation.

Appeal from Sedgwick District Court; PAUL W. CLARK, judge. Opinion filed July 25, 2014. Affirmed in part, reversed in part, sentence of death vacated, and case remanded.

Debra J. Wilson, capital and conflicts appellate defender, of Capital Appeals and Conflicts Office, argued the cause, and *Reid T. Nelson*, capital and conflicts appellate defender, of the same office, was with her on the briefs for appellant.

Kim T. Parker, deputy district attorney, argued the cause, and *Debra S. Peterson*, special prosecutor, *David Lowden*, chief attorney, *Lesley A. Isherwood*, assistant district attorney, *Nola Tedesco Foulston*, former district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

Per Curiam: Defendant Reginald Dexter Carr, Jr., and his brother, Jonathan D. Carr, were jointly charged, tried, convicted, and sentenced for crimes committed in a series of three incidents in December 2000 in Wichita. This is R. Carr's direct appeal from his 50 convictions and 4 death sentences.

In the first incident on December 7 and 8, Andrew Schreiber was the victim. The State charged R. Carr and J. Carr with one count of kidnapping, one count of aggravated robbery, one count of aggravated battery, and one count of criminal damage to property. The jury convicted R. Carr on all counts and acquitted J. Carr on all counts.

In the second incident on December 11, Linda Ann Walenta was the victim. The State charged R. Carr and J. Carr with one count of first-degree felony murder. The jury convicted both men.

In the third incident on December 14 and 15, Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims of an invasion at the men's Birchwood Drive home that led to sex crimes, kidnappings, robberies, and, eventually, murder and attempted murder. The State charged R. Carr and J. Carr with eight alternative counts of capital murder, four based on a related sex crime under K.S.A. 21-3439(a)(4) and four based on multiple first-degree premeditated murders under K.S.A. 21-3439(a)(6); one count of attempted first-degree murder; five counts of aggravated kidnapping; nine counts of aggravated robbery, eight of which were alternatives, four based on use of a dangerous weapon and four based on infliction of bodily harm; one count of aggravated burglary; 13 counts of rape, eight of which were based on coerced victim-on-victim sexual intercourse and one of which was based on a victim's coerced self-penetration; three counts of aggravated criminal sodomy, two of which were based on coerced victim-on-victim oral sex; seven counts of attempted rape, six of which were based on coerced victim-on-victim overt acts toward the

perpetration of sexual intercourse; one count of burglary; and one count of theft. The State also charged R. Carr and J. Carr with one count of cruelty to animals because of the killing of Holly G.'s dog. The jury convicted R. Carr and J. Carr on all of the charges arising out of the Birchwood incident.

In connection with the three incidents, the State also charged R. Carr alone with three counts of unlawful possession of a firearm. The jury convicted him on these three counts as well.

In the separate capital penalty proceeding that followed, R. Carr and J. Carr were sentenced to death for each of the four capital murders committed on December 15. They each received a hard 20 life sentence for the Walenta felony murder. J. Carr received a controlling total of 492 months' imprisonment consecutive to the hard 20 life sentence, and R. Carr received a controlling total of 570 months' imprisonment consecutive to the hard 20 life sentence for the remaining nondeath-eligible crimes.

In his briefs, R. Carr raises 21 issues tied to the guilt phase of his prosecution and 19 issues tied to the death penalty phase of his prosecution. In addition, because this is a death penalty case, this court is empowered to notice and discuss unassigned potential errors under K.S.A. 2013 Supp. 21-6619(b), which we do. R. Carr does not challenge the sentences he received for the Schreiber crimes; for the Walenta felony murder; for the crimes in which Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims that were not eligible for the death penalty; or for the cruelty to animals conviction.

Both sides sought many extensions of time to file briefs in this appeal and in J. Carr's separate appeal. In R. Carr's case, all of these extension requests were unopposed by the other side of the case. After completion of briefing, this court heard oral argument on December 17, 2013.

After searching review of the record, careful examination of the parties' arguments, extensive independent legal research, and lengthy deliberations, we affirm 32 of R. Carr's 50 convictions, including those for one count of capital murder of Heather M., Aaron S., Brad H., and Jason B. under K.S.A. 21-3439(a)(6); for the felony murder of Walenta; and for all of the crimes against Schreiber. We reverse the three remaining convictions for capital murder because of charging and multiplicity errors. We also reverse his convictions on Counts 25, 26, 29 through 40, and 42 for coerced sex acts for similar reasons. We affirm the convictions based on Counts 2, 9 through 24, 27, 28, 41, and 43 through 58.

We vacate R. Carr's death sentence for the remaining capital murder conviction, because the district judge refused to sever the defendants' penalty phase trials. We remand to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND FOR GUILT PHASE ISSUES

Resolution of R. Carr's claims on this appeal demands a comprehensive review of the disturbing facts underlying his convictions and sentences. It also requires discussion of the actions now attributed to J. Carr, as the defendants' cases were joined at the hip

until appeal and their challenges to their convictions and death sentences are necessarily intertwined.

The Schreiber Incident and Investigation

The first incident began when Schreiber went to a convenience store at 21st and Woodlawn at 10:45 p.m. on December 7, 2000. He parked his 1998 Ford Expedition on the side of the building and went inside to make a purchase. Just after he returned to his car and sat down in the driver's seat, a man holding a small, black, semi-automatic handgun palm down approached and placed the gun's barrel against the glass of the window in the driver's door. The man ordered Schreiber to move over to the front passenger seat.

As Schreiber followed the order and the man climbed into the driver's seat, the man hit Schreiber in the back of the head with the gun and told him to hurry up. Once both were situated, the man backed the Expedition out of the parking lot and drove away. As he was driving, he asked Schreiber if he had any money. Schreiber said yes and handed over his wallet.

The man pulled into a nearby alley, and a second man came up to the front passenger window and pointed another gun at Schreiber. The driver ordered Schreiber to let the other man into the front passenger seat and then get into a middle seat behind the front seat of the Expedition. As the second man got into the car, he hit Schreiber in the head with his gun and told Schreiber not to look at him.

The two men asked Schreiber if he had an ATM card, remarking that someone who drove a car like the Expedition must have money. When Schreiber said he

had an ATM card, the driver gave Schreiber his wallet and had him get his ATM card out. Schreiber then handed the wallet back to the driver.

The driver went to a nearby ATM, pulling up beside it so that Schreiber could access the machine through the rear passenger window. Schreiber told the men that he could withdraw only $300 at a time. They instructed him to withdraw $300, and, as the machine dispensed the money, the men told Schreiber to hand it over his shoulder without looking at them, which he did. The passenger grabbed the money. The two men then told Schreiber to hand them the receipt, which he did in the same way. When the passenger determined from the receipt that Schreiber still had money, he said they were not done yet.

The driver went to a second ATM, where Schreiber again withdrew the maximum of $300. Again, the men asked for the receipt, and, after determining that Schreiber still had money in his account, they again said they were not done.

At a third ATM, Schreiber tried to withdraw $300, but there were insufficient funds to cover that amount. The men told Schreiber to try to get $200, and the transaction processed successfully. Schreiber handed the passenger the money and the receipt in the same way that he did at the first and second ATMs. When the passenger looked at the third receipt, he said they were going to leave Schreiber with 8 dollars and some change, which the two men appeared to find funny.

During the entire time the two men took Schreiber from ATM to ATM, the second man held a gun to Schreiber's head. Schreiber described the passenger's

gun as a dark semi-automatic handgun. During the episode, including a stretch of driving when the Expedition moved north of the convenience store and then west on Kansas Highway 96, the men demanded that Schreiber remove any jewelry and give it to them. Schreiber handed over a silver Guess watch with a blue face. While he was removing the watch, he turned his head and was again hit on the head and told not to look at the two men.

The men also discussed what they were going to do with Schreiber, including the possibility of dropping him off on a dirt road. After driving on several dirt roads bordered by open fields, however, the men determined that the locations were not remote enough for their purposes. The men also discussed the Expedition, the driver commenting on how much he liked it and wanted one. The passenger said at one point that he planned to take Schreiber's pants and shoes when they dropped him off, because it was so cold outside. The passenger appeared to be amused by his own remark.

Eventually, the men took Schreiber back into town and stopped at a car wash near Windsor at Woodgate Apartments on East 21st Street. There, after two switches between the positions of the passenger and Schreiber, they told Schreiber to lie face down on the floor in front of the middle seat. They also discussed dropping the second man off at their car.

After leaving the car wash, the driver stopped the Expedition again and the passenger got out of the car. As he left, he reminded the driver to be sure to wipe down the Expedition. The driver told the passenger to follow him. Schreiber heard another vehicle. Both cars

were driven for several more minutes and then stopped. The driver told the other man that they had not arrived at the right spot and that the second man should continue to follow.

The two cars were driven for another 5 to 10 minutes before they were stopped again. Schreiber could tell that this time the cars had left the paved road. Schreiber heard the driver turn off the ignition and then wipe the surfaces in the Expedition.

The driver then got out of the Expedition and had a discussion with the second man about whether they were going to leave Schreiber's keys behind. The second man then told Schreiber that the two men were going to put the keys in the street. The driver asked Schreiber if he had a spare tire and Schreiber said that he did. The driver said he was going to slash the tires. Schreiber then heard someone fire three shots.

The driver instructed Schreiber to wait 20 minutes before leaving the scene. Schreiber heard the men get into the other car and drive away. As they did so, he peeked out of a window of the Expedition and saw the receding square taillights of the other car.

Schreiber found his keys. One of the Expedition's tires had three holes in it, but he was able to maneuver the car back onto the paved road near 43rd Street and Webb Road and drive home, where he called 911.

When law enforcement responded to Schreiber's call, he told police that the driver who accosted him was a black male in his 20s, approximately 5 feet 9 inches or 5 feet 10 inches tall and with a medium build. Schreiber said the driver was wearing a beanie or stocking cap of some type, blue jeans, and a

long-sleeved dark t-shirt or sweatshirt. The driver had some facial hair but not a full mustache or a full beard. Schreiber described the second man as a black male who was taller than the driver, and who was wearing a winter jacket or parka.

The Walenta Incident and Investigation

The second incident, at about 9:40 p.m. on December 11, 2000, took place in the driveway of Walenta's home on Dublin Court in east Wichita.

Walenta, who was a cellist with the Wichita Symphony, was arriving home from practice in her 2000 GMC Yukon. As she turned into one of the side streets near her home, she noticed a newer, light-colored, four-door Honda-type vehicle turn behind her.

The car continued to follow Walenta's Yukon as she turned into her street, a dead end with a cul-de-sac. As Walenta approached her house, she noticed that the car had stopped in front of the residence directly south of hers. And, when she pulled into her driveway, she saw a black male get out of the front passenger side of the car and begin walking toward the driver's side of her Yukon.

As the man approached, he said he needed help. Walenta rolled her window down a few inches, and the man immediately pointed a handgun through the window, palm down and at her head. Walenta tried to start her Yukon, which ground the starter gear because the car was already running. The man then told Walenta not to move the Yukon, but Walenta shifted into reverse. When she did, the man shot her.

The gunman began to run away, and, as he did, the other car appeared to be leaving. Walenta was not sure whether the gunman may have been left behind by whoever was driving the car that had followed her.

After Walenta had been shot, her across-the-street neighbor, Anna Kelley, heard a car horn honking. When Kelley looked outside, she realized that the honking was coming from Walenta's Yukon, and that the Yukon's lights were flashing. When Kelley opened her front door, Walenta began calling to her for help. Kelley's husband called police as Kelley ran to Walenta's car. The Yukon was still running; its driver's window had shattered; and Walenta was slumped backward in the driver's seat.

While waiting for police to arrive, Walenta told Kelley she had been shot by a black man with wiry hair. She also said that a light-colored car had followed her into her street.

Once transported to the hospital, Walenta provided somewhat more detailed descriptions of the gunman, although they varied in certain respects from one another. She described the gunman as a black male in his 30s with a medium build. She said his hair was long, straight, and wiry, and described it as shoulder-length with corkscrews. At different points, she estimated his height at between 5 feet 7 inches and 6 feet; as between 5 feet 9 inches and more than 6 feet; and as approximately 6 feet. The only description she was able to give of the gunman's clothing was that he might have been wearing a beige trench coat.

Walenta suffered three gunshot wounds, and one of the bullets severed her spinal cord, rendering her

paraplegic. But she began recovering during her stay in the hospital and was scheduled to be transferred to a rehabilitation facility on January 2, 2001. That day, however, Walenta suffered a pulmonary embolus—a complication of her paralysis—and died.

The Quadruple Homicide and Crimes Leading to It

The third incident began on December 14, 2000, at a home shared by Aaron S., Brad H., and Jason B. at 12727 Birchwood, the middle unit of a triplex at the intersection of 127th and Birchwood.

Holly G., who was the girlfriend of Jason B., was with Jason B. at the home. Holly G. had her dog with her as well. Aaron S. and his friend, Heather M., also were at the home, as was Brad H.

As Holly G. and Jason B. began getting ready for bed at about 10:30 p.m., Holly G. pulled her hair back and fastened it with a plastic clip. Jason B. turned off the front porch light, made sure the front door was locked, and then came to bed. Holly G.'s dog was in Jason B.'s bedroom with Holly G. and Jason B.

A few minutes later, the porch light came on again. Holly G. heard Aaron S. talking to someone whose voice she did not recognize. Then Jason B.'s bedroom door burst open, and a tall black man with a gun came through the doorway. Jason B. screamed as the gunman yanked the covers off of the bed. A second black man, holding onto Aaron S. by the shirt, came into the room and pushed Aaron S. onto the bed with Holly G. and Jason B. The man also was armed.

The two intruders asked if anyone else was in the house and were told Brad H. was downstairs. One of

the intruders went downstairs to get Brad H. while the other stayed in the bedroom. The intruder who stayed upstairs kept demanding to know if there was anyone else in the house, saying, "[D]on't lie, don't lie." Aaron S. eventually told him that Heather M. was in the other upstairs bedroom. When the intruder who had gone downstairs returned to the bedroom with Brad H., he was carrying a golf club, and he ordered Brad H. onto the floor at the foot of the bed. One of the intruders retrieved Heather M. from the other bedroom and told her to get on the floor in Jason B.'s bedroom as well.

The intruders demanded to know where the phones in the house were and whether there was a safe. One of them was shouting, "Where's the safe? A house this fucking nice[,] there's got to be a safe!" One looked around the house while the other stood guard over the five friends. At one point, the intruders also said that someone needed to "shut . up" Holly G.'s dog or they would shoot it. Eventually the dog was muzzled.

The intruders also demanded to know who among Heather M., Aaron S., Brad H., Jason B., and Holly G. had money. When none had any cash, the intruders asked who had ATM cards. Each raised his or her hand, and the intruders asked each how much money he or she had in the bank. After obtaining this information, the intruders had a whispered discussion. They then ordered the five victims to remove their clothes. The intruders then pulled all of the clothes out of the closet in Jason B.'s bedroom, ordered the five into the closet, and told them to sit down. They were threatened not to speak to each other.

The intruders then conversed about wanting to watch two women engage in sex acts and ordered Holly G. and Heather M. to go to the bar area outside of Jason B.'s bedroom. They told the women to "suck that pussy." Holly G. and Heather M. complied; Holly G. performed oral sex on Heather M., and then Heather M. performed oral sex on Holly G. The intruders also demanded that the two women use their fingers to penetrate each other's vaginas; again, the women complied. During these acts, both intruders watched and made further demands, telling the women again to "suck that pussy" and "do it deeper." When Heather M. was performing oral sex on Holly G., one of the intruders hit Holly G.'s knee so that he could get a better view of what was happening.

Next, the intruders brought each of the three male victims out to the bar area one at a time and ordered each to have sexual intercourse with Holly G. Although one of the intruders had thrown a shirt or other piece of clothing over Holly G.'s face, she remained able to see her feet and distinguish between the three male victims during these acts. The first was Brad H.; the second, Jason B.; the third, Aaron S. At some point during these acts, Heather was moved from beside Holly G. to the closet.

Neither Brad H. nor Jason B. was able to achieve an erection, but penetration of Holly G. nevertheless occurred. The intruders made comments about "popping" someone's "ass," if the absence of an erection prevented fulfillment of their demands. Aaron S. initially defied the intruders, saying, "[N]o, I don't want to do this." One of the intruders then became angry and hit Aaron S. in the back of the head with something

hard, causing him to cry out in pain. Aaron S. then attempted to comply by having intercourse with Holly G.

After these acts, the intruders ordered Holly G. back into the closet in Jason B.'s bedroom and brought Heather M. from the closet out to the bar area. They then commanded Aaron S., Jason B., and Brad H., in that order, to have sexual intercourse with Heather M.

During these events, the intruders threatened to shoot if one of the men did not achieve an erection. Holly G. heard one of them say words to the effect of: "[I]t's 11:53, it's 11:54, somebody better get their dick hard, get a hard on." Holly G. heard Heather M. moaning in pain when each of the three men was outside of the closet. When Aaron S. was in the bar area with Heather M., Holly G. heard Aaron S. say again that he did not want to do what he was being ordered to do.

By this time, about midnight, Holly G. had seen enough of the two intruders that she was able to differentiate between them. The one she referred to as the first was a taller, thinner, black male who was wearing an orange and black sweater with the word "FUBU" on it, black jeans, a leather coat, and some kind of boots. The intruder Holly G. referred to as the second was stockier than the other and was wearing a black leather coat.

After the coerced victim-on-victim sex acts, the stockier of the two intruders took Brad H. to a series of ATMs. Before they could leave, there was a problem finding car keys, which caused the intruders to say that

someone had better find his or her "fucking keys" or someone would be shot.

While Brad H. was gone with the stockier intruder, the taller, thinner intruder ordered Holly G. out of the closet. He ordered her to get on all fours and get herself "wet." To comply, Holly G. placed her finger in her vagina. The intruder then vaginally raped her from behind. During the rape, Holly G. was able to see that the intruder had laid a small, silver handgun on the floor. The gun was 4 inches to 5 inches long and was not a revolver. The other gun Holly G. had seen that night was black.

When the taller, thinner intruder returned Holly G. to the closet, he ordered Heather M. out of it and raped or attempted to rape her. From inside the closet, Holly G., Jason B., and Aaron S. could hear Heather M. moaning. Aaron. S., in particular, was crying and saying, "[T]his shouldn't happen this way." Heather M. was never put back into the closet.

Brad H. and the stockier intruder were away from the home about 30 minutes. The stockier intruder then took Jason B. to two ATMs. Jason B. and the intruder were gone about 20 minutes.

There followed a discussion about which of the remaining victims would leave next with the stockier intruder. Holly G. said she would go. She got out of the closet, put on a white sweatshirt, and took her ATM card out of her purse. The stockier intruder took her through the front door to the outside and told her to get into the driver's side of Jason B.'s silver Dodge Dakota pickup truck. The intruder sat slouched back in the

corner of the passenger seat with what Holly G. believed to be a gun in his hand.

At the Commerce Bank ATM to which Holly G. drove at the stockier intruder's direction, Holly G. withdrew $350, the maximum amount allowed in one withdrawal. She then unsuccessfully attempted a $200 withdrawal and then successfully made a $150 withdrawal. This exhausted her available money. When she leaned out of the truck to take the cash out of the machine, the stockier intruder groped her vagina with his gloved hand.

At one point during this trip, Holly G. asked the stockier intruder if he was going to shoot her and the other victims. He said no. She then asked him if he promised not to shoot them, and he said, "Yeah, I'm not going to shoot you."

Also during the trip to the ATM, the stockier intruder asked Holly G. if the other intruder had had intercourse with her. When Holly G. said that he had, the stockier intruder wanted to know if she had enjoyed it. To appease him, Holly G. said yes. She had seen what she believed to be a gun in his lap. The stockier intruder also asked if she had ever had sex with a black person and if it was better with the taller, thinner intruder than with her boyfriend.

When Holly G. and the stockier intruder were walking back into the house, he told her it was too bad they had not met under other circumstances because she was kind of cute and they could have dated. She replied, "[K]ind of, yeah." He then asked, "[W]hat does that mean?" Holly G. responded that she wasn't really having a good time.

When Holly G. returned to the closet, she told Aaron S., Brad H., and Jason B.: "I think we're all going to be okay. I asked him, he said he's not going to shoot us."

Aaron S. was the next to leave the home with the stockier intruder. Holly G. thought Aaron S. put on pants and a shirt before they left.

While Aaron S. was gone, the taller, thinner intruder opened the closet door and offered the remaining victims a glass of whiskey, which they refused. Holly G. then heard someone handling a popcorn tin and a change jar. She heard the taller, thinner intruder ask Heather M., who was outside of the closet at the time: "[W]hose is this?" Heather M. said she did not know, but it was probably Holly G.'s. He then asked which of the male victims was Holly G.'s boyfriend, and Heather M. said Jason B. The taller, thinner intruder then opened the closet door and asked for Jason B. When Jason B. identified himself, the intruder asked him if the item that had been found was the only one of its kind. Jason B. said yes. The item was an engagement ring Jason B. had purchased for but not yet given to Holly G.

When Aaron S. returned, the stockier intruder told Holly G. to leave the closet and pushed her into the dining room by jabbing her in the back with something she assumed was a gun. He said, "Don't worry[.] I'm not going to shoot you yet." The stockier intruder then made Holly G. get down onto all fours and vaginally raped her from behind. He then grabbed her, turned her around, ejaculated into her mouth, and ordered her to swallow. Holly G. was able to see the stockier intruder's face at this point.

Holly G. went to the bathroom, but, when she opened the bathroom door, she saw the taller, thinner intruder raping Heather M. from behind. Heather M. was on all fours, and the taller intruder was on his knees. The bathroom light was on, and the second intruder was only 2 feet to 3 feet in front of Holly G.; so she was able to see his face. The taller intruder shut the door, telling Holly G. he was not finished yet.

Holly G. waited outside the bathroom door for a few minutes and then opened it again. The taller intruder then directed Holly G. to get down on all fours. She complied and he again vaginally raped her from behind. After he stopped, Holly G. heard what sounded like a condom being removed, and then the toilet was flushed.

Holly G. was then directed back to the bar area, where Heather M. was already sitting. The three male victims remained in the closet in Jason B.'s bedroom. The women were cold and Holly G. put on a sweater. The two intruders were talking to each other, and then the stockier one went downstairs. When he came back upstairs, Holly G. heard him say something about a big screen television. Brad H. had a big screen television in his downstairs bedroom.

Holly G. also was able to get a better look at the stockier intruder at that time. She saw his face and noted that his hair was close to his head and not sticking out like the thinner intruder's hair.

At some point, the intruders used cleaning solution to wipe various surfaces and things in the house. When they had finished this task, all five victims were taken to the garage. Holly G. and Heather M. were wearing

nothing but sweaters. Aaron S. was still wearing pants and a shirt. Brad H. and Jason B. were naked.

Holly G. and Heather M. were directed to get into the trunk of a beige Honda Civic belonging to Aaron S. The intruders then tried to get all three of the men into the trunk, but they could not fit. Holly G. and Heather M. were then put into the back seat of the Honda, and the men were put into the trunk. Holly G. was then directed to get into the passenger side of Jason B.'s truck. After some discussion between the intruders, as the stockier intruder was taking Holly G. to the truck, the taller, thinner intruder said, "If she gives you any trouble . . let me know and we'll take care of that."

The taller, thinner intruder drove away from the Birchwood home first in the Civic, followed by the stockier intruder driving the truck. As she rode with the stockier intruder, Holly G. asked him where they were going. He said they were going somewhere to drop the five victims off—away from their cars and the home. Again, Holly G. was able to see the stockier intruder's face; at this point, he was making no effort to keep her from looking at him. Holly G. noted that the clock in the truck showed it was 2:07 a.m.

The Honda and the truck were driven to a soccer field at 29th Street and Greenwich Road, and the intruders got out. Holly G. was ordered to get into the driver's seat of the Civic. The two intruders talked to each other for a couple of minutes, and then the male victims were brought out of the trunk and made to kneel in front of the Civic.

At this point, Holly G. turned to Heather M. and said, "Oh my God, they're going to shoot us." She and

Heather M. were then directed to get out of the car. Holly G. knelt by Jason B., and Heather M. knelt by Aaron S.

Holly G. saw that the two intruders were standing fairly close together. She then heard a shot, and everyone started screaming. Aaron S. was pleading, "Please, no" and used the word, "sir." Holly G. heard three more shots.

Holly G. then felt an impact on the back of her head and everything went gray. She remained kneeling, but then she was kicked over and fell forward. She heard talking, heard one of the truck's doors shut, heard its engine start, and then felt another impact. She thought she had been run over. She heard the truck drive away after pausing for a moment, and she waited until she could no longer hear it before she looked to see if the intruders and the truck were gone. She saw the truck go south on Greenwich Road and, when its lights disappeared, she got up and began checking to see if any of the four other victims was still alive.

Holly G. looked at Jason B. first. She rolled him over and saw blood coming from one of his eyes. She took her sweater off and tied it around Jason B.'s head to try to stop the bleeding. After looking at the others, Holly G. decided she needed to get help. Looking for the nearest safe place, she spotted a house with white Christmas lights in the distance. Now naked and barefoot, Holly G. ran more than a mile through snow, crossing several fences, some with barbed wire, to get to that house.

It was approximately 2:15 a.m. on December 15, when Steve Johnson and his wife heard someone

pounding loudly on their front door and ringing their doorbell. Johnson looked outside and saw a naked woman at his door. He opened the door and the woman, Holly G., told him that she and four friends had been abducted, taken to a nearby field, and shot. Holly G. had blood on her back, and her hair was matted as a result of some type of wound. The Johnsons let Holly G. inside, gave her blankets, and called 911.

Investigation Leading to R. Carr's Arrest and Discovery of Evidence

Sedgwick County Emergency Communications dispatch received the Johnsons' call at 2:37 a.m. Johnson tried to convey everything Holly G. was telling him to the 911 operator, but he ultimately handed the phone to Holly G. because she was giving him information too fast for him to pass it on. Holly G. was afraid she was not going to survive and wanted the police to know everything that she knew about the Birchwood crimes.

Holly G. told the 911 operator that two black men broke into the Birchwood home at 11 p.m. She said the two intruders put her and her four friends in a closet, took turns raping her and the other woman who was at the house, and took them one-by-one to ATMs to make them withdraw money from their bank accounts. She said the two men then took two of their vehicles, a silver Dodge Dakota pickup truck and a beige Honda Civic, and drove them to a field on Greenwich Road past 37th Street. There, the two men made them get on their knees and then shot all five of them in the back of the head. The two intruders then drove away in the truck.

Holly G. also gave a description of her attackers to the dispatcher. She said one of the men was tall and skinny, about 6 feet tall, had hair like "Buckwheat," and was wearing an orange and black sweater and black "jean-type" pants. The other had a heavier build, was also about 6 feet tall, and was wearing a black leather coat.

While Holly G. was being treated in a local hospital emergency room, officers obtained additional information from her. She said the intruder with the orange and black sweater was in his early 20s; was about 6 feet tall and weighed 175 pounds; had a bushy afro that stuck out about 2 inches; and was wearing black leather gloves and blue jeans. The other intruder was in his early 20s; was about 6 feet tall and weighed 190 to 200 pounds; and was wearing a black leather coat, black leather gloves, blue jeans, and boots. She said both men were carrying small semi-automatic handguns.

Holly G. had suffered a gunshot wound to the back of her head. The impact fractured her skull; but the bullet did not penetrate into her brain, apparently because it had been deflected by the plastic hair clip she was wearing. Holly G. also had other injuries, including bruises to her face and frostbite to her feet.

While Holly G. was transported and treated at the hospital, law enforcement found Aaron S.'s Honda Civic and the bodies of the four other victims lying in a road at the snow-covered soccer field where they had been shot. Sheriff's Deputy Matthew Lynch was first on the scene. He detected no pulse in Heather M. Aaron S. appeared to be attempting to breathe, as did Brad H. Jason B. did not appear to be breathing and had no

pulse. Lynch advised dispatch that there were four "code blue" victims, meaning each was at least in cardiac arrest. EMS arrived on the scene at 2:54 a.m.

Officers collected spent cartridge casings, a bullet fragment, an ATM receipt reflecting a withdrawal on December 15 at 1:17 a.m., and pieces of Holly G.'s plastic hair clip at the soccer field.

Meanwhile, Wichita Police Officer Michael Dean was dispatched to the Birchwood home. He arrived at approximately 3 a.m. About that same time, Sergeant John Hoofer also was dispatched to the home. On his way there, Hoofer saw a Dodge Dakota pickup passing him in the opposite direction at about 127th Street. Because the vehicle matched a description that had been put out over the police radio, he turned around to pursue it. In the process, he lost track of it.

Hoofer arrived at the Birchwood home at 3:19 a.m., and he and Dean went inside. The home appeared to have been ransacked. In the bedrooms, dresser drawers had been pulled out; clothes were strewn all over; and the beds had been stripped of their linens. In the living room, an entertainment center had an open space where a television would have been, and a coaxial cable had been pulled through the open space and was lying on the floor. Downstairs, there was a computer desk with no computer. In what law enforcement would later learn was Jason B.'s bedroom, there was a large pool of blood on the corner of the mattress and what appeared to be a bullet hole. On the floor below that part of the mattress was a dead dog. The two officers then went back outside and secured the home as a crime scene.

A short while later, Dean was standing by his patrol vehicle when he saw an older white Plymouth come down 127th Street and drive by the Birchwood residence. He thought this was unusual, because it was 4 a.m. in a secluded residential area where there had been very little traffic, and the streets were snow-packed, making driving conditions hazardous. It was just a few minutes later when Dean saw the same vehicle coming down Birchwood. As the car drove past, Dean saw that the driver was a black male wearing a stocking cap. The driver stared straight ahead as the car passed, never acknowledging the officer or looking at what was now an obvious crime scene surrounded by police tape. Dean thought this was highly unusual and noted the car's Ford County license plate number. He watched as the vehicle turned onto 127th Street and headed back in the direction from which it had come the first time he saw it. He notified Hoofer that he needed to stop the vehicle and identify the driver.

At 4:13 a.m., Hoofer stopped the white Plymouth, a 1988 model, as it was driving away from the area of the Birchwood residence on 127th Street. He noticed a black leather coat on the back seat. The driver was R. Carr. He showed Hoofer a piece of paper identifying him and listing a Dodge City address. R. Carr told Hoofer he was driving to the apartment of his girlfriend, Stefanie Donley. From R. Carr's description, Hoofer recognized the apartment's location as the 5400 block of East 21st Street, the address of the Windsor at Woodgate complex. At some point after R. Carr identified himself, the encounter with Hoofer ended; and R. Carr drove away.

At about 4:30 a.m., R. Carr arrived at Donley's apartment. He stayed approximately 15 minutes and left again, returning about 45 minutes later.

About the same time R. Carr returned to the apartment complex, Christian Taylor, another resident of Windsor at Woodgate, was watching the local news as he got ready for work. He saw a report on a quadruple homicide during the previous night and noted that police were looking for a gray or silver Dodge Dakota pickup truck. As Taylor left his apartment to go to his car about 6:25 a.m., he saw a Dodge Dakota pickup truck fitting the description parked on the other side of an empty spot next to his car. The truck was backed in so that its tailgate was facing a fence; the tailgate was down. A large TV was in the bed of the truck. He then saw a black man, later identified as R. Carr, appear from behind the truck. Taylor described the man as in his 20s or 30s, with a few days' growth of facial hair, wearing blue jeans and a black or brown leather jacket, and with a scarf or hood covering his head.

Thinking the truck and the man he saw might have something to do with the quadruple homicide, Taylor got into his car, drove out of the parking lot, and headed to the nearest police station to report what he had seen.

Meanwhile, sometime after 6 a.m., Riwa Obel Nsangalufu, another resident of the Windsor at Woodgate complex, left his apartment to start his car and let it warm up. As he walked, he saw a man, later identified as R. Carr, trying to drag a large television on a blanket toward Building 8. Obel noticed a silver Dodge Dakota that was backed up against the fence

with its tailgate down. R. Carr asked Obel to help, explaining he was moving in. After several requests, Obel agreed.

Obel helped R. Carr get the television up a set of stairs to Apartment 819. At that point, R. Carr told Obel that he could get the television inside by himself. R. Carr offered Obel a tip for helping him and displayed some folded bills. Obel refused the money.

R. Carr then knocked on the door of Apartment 819 and Donley came out. She asked R. Carr where he had been all night and said she had been waiting for him.

R. Carr told Donley that his sister had made him take his things out of her garage. He then began bringing various items into her apartment. He also had about $900 in cash that he took out of his pocket. R. Carr, according to Donley, was trying to reach J. Carr, and finally talked to him on the telephone at 5:30 a.m. to 5:45 a.m. R. Carr told Donley that J. Carr was seeing a married woman, that the woman's husband came home, that there was a shootout, and that J. Carr had run off.

A short while later, R. Carr took a shower, and Donley noticed that he removed a pair of red shorts he had been wearing under his pants the previous evening.

An officer investigating Taylor's report located the Dodge Dakota at the apartment complex parking lot and confirmed it had belonged to Jason B. The tailgate of the truck was down, and there were footprints and drag marks in the snow that led to a multicolored comforter on a sidewalk. On the other side of the fence behind the truck, the officer saw clothing that appeared

to have been thrown over the fence. There was also a blue-and-white-striped comforter in a trash dumpster next to the pickup truck. Law enforcement later confirmed that the bedding and clothing belonged to residents of 12727 Birchwood.

At about the time that the officer was observing the comforter in the dumpster, Obel was leaving the apartment complex to go to work. The officer stopped Obel, and Obel told the officer about helping a man move a large TV from the truck to an apartment in Building 8. Obel showed the officer Apartment 819.

Officer Jamie Crouch was among the law enforcement agents who responded to the Windsor at Woodgate apartments and he stationed himself outside the balcony of Apartment 819. He heard other officers knock on the apartment's door and announce their identity as police. A few seconds later, the apartment's sliding glass door onto the balcony opened. R. Carr emerged from the apartment; and he placed his hands on a balcony railing as if he were going to jump from the balcony to the ground.

When the officers knocking on the door entered the apartment, Officer Renay Bryand observed R. Carr coming back into the apartment from the balcony. R. Carr was arrested. On his person, officers found a gas card bearing Jason B.'s name; a watch that belonged to Heather M.; and $996, including 49 $20 bills.

Inside Apartment 819, officers also found numerous items belonging to the residents of 12727 Birchwood. These items included Brad H.'s large television, Jason B.'s checkbook, a garment bag with an identification tag for Aaron S., computer equipment belonging to

Aaron S., tools, electronic equipment, clothing and jewelry, and several travel bags. The officers also found a credit card belonging to Holly G. They also found Brad H.'s wallet and Schreiber's Guess watch in a bedroom, under letters addressed to R. Carr. Shorts and t-shirts belonging to R. Carr were recovered from a bathroom and a sofa in the apartment. The officer also found a stocking cap, dark leather gloves, and a dark leather coat. Inside the pocket of the leather coat were two Intrust Bank receipts from 12:06 that morning. The receipts showed balance inquiries made on checking and savings accounts belonging to Brad H.

Inside the Dakota pickup truck, officers found an ATM card bearing Jason B.'s name and a wallet containing his driver's license. They also found two Commerce Bank ATM receipts showing withdrawals that morning. One receipt showed a withdrawal of $200 at 12:31 a.m. from Jason B.'s bank account, and the other showed withdrawals of $350 and $150 at 12:53 a.m. from Holly G.'s bank account.

J. Carr's Movements and Arrest and Discovery of Evidence

While police were following up on Holly G.'s appearance at the Johnsons' door, J. Carr had called his friend, Tronda Adams, at 3:31 a.m. and said he missed a 2:30 a.m. train he had intended to take to Cleveland, Ohio. Adams granted J. Carr permission to spend the night at the home she shared with her mother, and he arrived there at approximately 3:45 a.m. He had driven Donley's Toyota Camry and was still wearing a brown leather jacket, an orange and black FUBU sweater, black pants, and brown or black boots—the same clothes he had been wearing the

previous evening when he said goodbye to Adams at 9:30 p.m. and left her home with his brother, R. Carr.

J. Carr asked Adams if she had a $20 bill for singles, and she observed that he had more than $500 in his pocket. Adams had never seen J. Carr with that amount of cash in the past. When she asked him where he had gotten the money, J. Carr said he had gone to the bank and withdrawn all of his funds before he was to leave town. Adams thought this was strange because J. Carr was unemployed and did not ordinarily reside in Wichita. Adams would eventually testify that her cell phone records showed that J. Carr made a call to Dodge City at 4:25 a.m. and a call to his sister at 4:26 a.m. She would also testify he woke her sometime between 4 a.m. and 5 a.m. to say that R. Carr was coming over to trade cars.

Later that morning, Adams saw news reports about the quadruple homicide. The reports said the police were looking for two suspects, one wearing an orange FUBU shirt. Adams woke J. Carr to tell him what had happened and to see how he would react to the news report. When she asked him if he had heard about four people getting killed, he said no. When she told him that the gunmen had taken the victims to ATMs and forced them to withdraw cash, J. Carr asked how the police knew that fact. Adams told him that one of the victims had survived.

Adams' mother, Toni Greene, was cleaning about 11 a.m. when she found a maroon jewelry box in one of the pockets of J. Carr's jacket. Inside the box was a diamond engagement ring. Thinking it must be intended for J. Carr's girlfriend in Ohio, she put the ring back where she found it.

About noon, Adams was watching the local television news while her mother and J. Carr were in the room with her. Adams saw video coverage of R. Carr being arrested and told J. Carr to go downstairs with her right away. Once downstairs, Adams asked J. Carr if he had seen the video of his brother being arrested. He said he did. When she asked him what had happened, he told her he was just hanging around drinking after he had missed his train, apparently at his sister's home. Adams told him that his story was not going to work: He had been wearing the orange FUBU sweater, and the police already had his brother. J. Carr became upset during this conversation and was crying.

While Adams and J. Carr were downstairs, Greene had continued watching the news. Although she did not recognize R. Carr as the person being arrested in the video, she learned that one of the items taken from the Birchwood residence was an engagement ring. She also learned that the police were looking for an older white Plymouth, and she had noticed a white Plymouth parked outside the house earlier that morning.

Greene checked outside to see if the Plymouth was still there. It was. She then called Adams upstairs and told her they needed to leave immediately. Greene told Adams that J. Carr was the person the police were trying to find. She specifically told Adams about the engagement ring she had seen in J. Carr's jacket pocket and the Plymouth that police were looking for parked outside. Adams and Greene went across the street to a neighbor's house, and Greene and the neighbor called the police.

Looking back toward her house, Adams saw J. Carr come to its front door and make an inquiring gesture in her direction. He was again wearing the FUBU sweater. When the police arrived, J. Carr moved away from the door and went back inside. And, a short while later, Adams saw J. Carr running through an alley. He had again removed the FUBU sweater.

After a foot chase, officers apprehended J. Carr. They found more than $1,000 in cash on his person.

Inside Adams' home, police found the orange and black FUBU sweater; leather gloves; and J. Carr's brown leather jacket. The jacket pocket still contained the engagement ring Jason B. had purchased for Holly G., as well as an identification card for J. Carr.

In addition, several items were collected from the white Plymouth. These items included two clocks belonging to Brad H.

While J. Carr was being driven to a hospital after his arrest, pursuant to a warrant for bodily specimens, he asked the transporting detective and officer about an earlier quadruple homicide in Wichita. When told the suspects had been arrested and charged with capital murder, he asked what capital murder was, how the death penalty was administered, and whether a person who received a lethal injection felt pain.

Additional Investigation and Evidence Identifications

Initially, Schreiber was not able to identify either of the men who kidnapped him by viewing photo arrays. However, on the morning of December 15, when Schreiber saw news footage of R. Carr's arrest, he believed R. Carr was one of the men. He called the

detective assigned to his case and said he was "about 90 percent sure that [R. Carr was] the person who abducted" him the week before.

Later, at preliminary hearing and trial, Schreiber identified R. Carr as the man who approached his car outside of the convenience store. He did not identify J. Carr as the second kidnapper at either preliminary hearing or trial.

Walenta was shown two photo arrays at approximately 7:15 p.m. on December 15. Walenta said that the first and second photographs in one array fit the general appearance of the person who shot her. She said the eyes of the person in the second photograph "represented what she remembered about the suspect who shot her." The person in the second photograph was R. Carr. The person in the first photograph was in prison at the time of the Walenta incident. Walenta was unable to identify anyone from the second array, which contained a photograph of J. Carr.

Holly G. had been shown two photo arrays at approximately 6:30 p.m. on December 15, and had been asked if she could identify "any of the people in the pictures as the intruders."

Holly G. said she thought the person in position number two in the first array, the same shown later to Walenta, was one of the men. That person was R. Carr. When asked why she thought the person in position number two was one of the men, Holly G. noted his eyes, his features, and his hair.

When she viewed the second array, Holly G. said she thought the other intruder was in position number one, based on her recognition of him and "similar hair

as to what [she] remembered," a "Buckwheat" hairdo standing off the head, kind of clumped together. The person in position number one was not R. or J. Carr and was in custody at the time of the Birchwood crimes. J. Carr was in position number four in the second array.

At preliminary hearing, Holly G. was not able to identify the second, stockier intruder at the Birchwood residence. By the time of the hearing, R. Carr had shaved his head, and he intermittently wore glasses. Holly G. was able to identify J. Carr as the first, taller intruder.

At trial, Holly G. identified both R. Carr and J. Carr—R. Carr as the second, stockier intruder and J. Carr as the first, taller intruder.

Autopsies

Heather M. died of a contact gunshot wound to her head. Her body showed bruising on her lower extremities. Injuries to her genital area were consistent with the application of force, and injuries to her knees were consistent with being placed on her hands and knees for the purpose of sexual intercourse.

Aaron S. died of a contact gunshot wound to his head. He sustained blunt trauma injuries to his head and neck; and his legs showed bruises, red discoloration, and scrapes. Injuries on his forehead and head were consistent with being hit with a golf club and the gun associated with the murders.

Jason B. died of an intermediate-range gunshot wound to his head. In addition, his body showed blunt

trauma injuries. An injury to his buttocks was consistent with being hit with a golf club.

Like Jason B., Brad H. died of an intermediate-range gunshot wound to his head. His face showed blunt trauma injuries.

All of the gunshot wounds to the four Birchwood murder victims were consistent with their bodies being in a kneeling position with their heads down when the bullets entered their skulls.

Holly G.'s dog sustained "severe injury and fracturing of the neck, almost to the point where the head had fallen down off of the support of the spinal cord and vertebrae." Testimony at trial established that the dog's injuries could have been caused by a golf club.

The dog also sustained a puncture wound to its neck.

DNA and Other Biological Evidence

Semen collected from the carpet in the dining room of the Birchwood home and a hair with attached root from Jason B.'s bedroom matched J. Carr's DNA.

J. Carr's DNA also was found in samples from Holly G.'s rape examination. Semen collected from Holly G.'s labia majora matched J. Carr's DNA; and a sample of Holly G.'s vaginal discharge was consistent with DNA from her and J. Carr, while all others at the Birchwood home were excluded as contributors. J. Carr was determined to be the major contributor to a mixed DNA profile found in semen from a swab of Holly G.'s lips, and all others at the home were excluded as contributors except for Holly G. and J. Carr.

A stain on J. Carr's boxer shorts matched Heather M.'s DNA. The results on a second stain on the boxer shorts excluded possible contributors other than Holly G., Heather M., and J. Carr.

Heather M.'s DNA was found in blood on the pair of R. Carr's red undershorts left on the bathroom floor when he took a shower at Donley's apartment on the morning of December 15. Heather M.'s DNA was also detected on a white t-shirt on the sofa in Donley's apartment. A test of DNA on a gray t-shirt from the sofa excluded everyone at the Birchwood residence except for Heather M. In addition, R. Carr's semen was found on a white muscle shirt, which he also left on Donley's bathroom floor.

Foreign material found on Holly G.'s thigh was tested and excluded everyone at the Birchwood residence except for her, R. Carr, and J. Carr.

An analysis of swabs from Heather M.'s vaginal entrance, clitoris, vagina, and vaginal vault was positive for the presence of seminal fluid. Blood also was detected on cervical swabs.

DNA samples from the penises of Aaron S., Brad H., and Jason B. also were tested. The sample from Aaron S. included him and Heather M. In addition to Brad H. himself, Holly G. could not be excluded on his sample. Jason B.'s sample was consistent with him, Holly G., and Heather M.

Testing was performed on three other hairs collected from the Birchwood residence.

A Wichita Police Department chemist trained in hair examination originally separated the total of four

hairs from other hairs and fibers collected from the Birchwood home. She testified that she performed the separation macroscopically and that she had labeled three of the hairs Negroid and a fourth as "possibly" so.

On further testing, one of the hairs produced no result and may have been a non-human animal hair. Another did not match either R. or J. Carr, both of whom are African-American; that hair was more typical of a Caucasian or a person with European ancestry. Mitochondrial DNA testing on the third hair, which had been collected from the floor of Jason B.'s bedroom, showed that neither R. Carr nor J. Carr could be excluded as the contributor. Persons within the same maternal line will have the same mitochondrial DNA; thus the two brothers would be expected to have the same mitochondrial DNA profile.

Blood on a golf club found at the Birchwood home was positively identified as nonprimate blood.

A law enforcement agent would eventually testify at trial that he observed warts on R. Carr's penis after R. Carr was arrested. Donley had also noticed lesions on R. Carr that she believed to be genital warts. Holly G. learned a few months after the Birchwood crimes that she had contracted HPV (Human papillomavirus), a virus that can cause genital warts.

Schreiber's Guess Watch also was tested for DNA, and the results were consistent with R. Carr.

Bank Account Transactions

Bank account records for Brad H., Jason B., Holly G., and Aaron S. showed the following chronology of transactions on December 14 and 15:

December 14, 2000:

Commerce Bank ATM

- 11:54 p.m. $350 withdrawal from Brad H.'s checking account
- 11:55 p.m. $350 withdrawal from Brad H.'s savings account
- 11:55 p.m. attempted $350 withdrawal from Brad H.'s account
- 11:56 p.m. attempted $350 withdrawal from Brad H.'s account

Prairie State Bank ATM

- 11:58 p.m. attempted $500 withdrawal from Brad H.'s account
- 11:58 p.m. attempted $350 withdrawal from Brad H.'s account
- 11:59 p.m. attempted $350 withdrawal from Brad H.'s account

December 15, 2000

Central Bank & Trust ATM

- 12:02 a.m. attempted $200 withdrawal from Brad H.'s account

Intrust Bank ATM

- 12:05 a.m. attempted $100 withdrawal from Brad H.'s account

  12:06 a.m. balance inquiry on Brad H.'s account

Commerce Bank ATM

- 12:31 a.m. $200 withdrawal from Jason B.'s Prairie State Bank account

Prairie State Bank ATM

- 12:31 a.m. attempted $250 withdrawal from Jason B.'s Prairie State Bank account
- 12:31 a.m. attempted $200 withdrawal from Jason B.'s Prairie State Bank account
- 12:32 a.m. balance inquiry on Jason B.'s Prairie State Bank account
- 12:32 a.m. attempted $200 withdrawal from Jason B.'s Prairie State Bank account
- 12:32 a.m. attempted $100 withdrawal from Jason B.'s Prairie State Bank account
- 12:32 a.m. attempted $100 withdrawal from Jason B.'s Capitol Federal account
- 12:34 a.m. $80 withdrawal from Jason B.'s Capitol Federal account

Commerce Bank ATM

- 12:53 a.m. $350 withdrawal from Holly G.'s account
- 12:54 a.m. attempted $200 withdrawal from Holly G.'s account
- 12:54 a.m. $150 withdrawal from Holly G.'s account

- 1:17 a.m. $350 withdrawal from Aaron S'.s account

Central Bank & Trust ATM

- 1:21 a.m. attempted $200 withdrawal from Aaron S.'s account

Gun Evidence

Between December 10 and December 12, Adams saw J. Carr with two guns: a small, silver revolver and a black handgun.

On December 10, she was having problems with her boyfriend, and J. Carr gave her the small, silver gun to use for her protection. At 11:15 p.m. on December 11, J. Carr showed up at Adams' home after being dropped off by R. Carr. J. Carr asked Adams to give the small, silver gun back to him. In return, he gave her the black handgun, a semiautomatic.

The next evening, J. Carr told Adams that he needed the black gun back, and she gave it to him. He asked how she had been touching it and scolded her for doing so too much. J. Carr then thoroughly cleaned the gun. He wiped down the barrel and the grip and then he ejected the clip and removed the bullets and wiped down the clip and each bullet.

About 3 months after the quadruple homicide, on March 19, 2001, a Winfield Correctional Facility inmate on clean-up detail found a Lorcin .380 caliber handgun at the intersection of Kansas Highway 96 and Greenwich Road in Wichita. Ballistics testing demonstrated that all of the bullets, casings, and fragments associated with the Schreiber, Walenta, and

Birchwood incidents came from the Lorcin .380 handgun. This included a casing found at the scene where Schreiber was left by his abductors, bullets and casings from Walenta's Yukon, a bullet from Walenta's chest, casings and a bullet fragment found at 29th and Greenwich Road, and a bullet from the body of Aaron S. Adams identified the Lorcin as the black handgun that J. Carr had given her the evening of December 11 and that she had returned to him on December 12.

Shoeprints and Cigar Ash

A print from J. Carr's left Timberland shoe had the same size, shape, and sole design as a shoeprint found on a cardboard sunshade in the garage at 12727 Birchwood. A print from the left shoe of R. Carr's pair of Buffalino boots had the same characteristics as a lift taken from a box under Jason B.'s bed. A print from R. Carr's right Buffalino boot had the same class characteristics as a lift taken from a tarp under Jason B.'s bed. Investigators found ashes on a desk in the basement that were wider in diameter than those from a normal cigarette. There were no ashtrays, cigarettes, or any other kind of smoking material in the residence. Investigators collected the ashes because they found the presence of the ashes to be "unusual." A partially smoked cigar was recovered from R. Carr's leather coat and another from the dashboard of his white Plymouth.

Birchwood Neighbor

After work on December 14, the night the Birchwood incident began, Jean Beck went to The Grape, a restaurant at Central and Rock Road in Wichita. The restaurant was a short distance from Walenta's home. Beck left at approximately 10:45 p.m.

in her 2000 BMW 323. As she was driving to her home at 12725 Birchwood, the triplex unit next door to 12727 Birchwood, she noticed a newer, tan Toyota four-door car behind her. As Beck turned off 13th Street into her residential area, the driver of the Toyota turned in behind her. Beck called her daughter and asked her to open the garage door at 12725 Birchwood; and, for safety, Beck stayed inside her car until the Toyota had passed her home. After the Toyota went by, it headed back toward 13th Street.

Defense Evidence

R. Carr put on a competing ballistics expert, who testified that his test firings from the Lorcin .380 were inconclusive in terms of a match to bullets and casings recovered from the crime scenes and bodies of the victims. However, the expert, Richard Ernest, admitted that he did not clean the gun before conducting the test firings and that the gun had significantly degraded by that time. He conceded that his conclusion could have been different if he had fired the Lorcin in the same condition as it was when the State's expert fired it.

J. Carr introduced an exhibit confirming his purchase of an Amtrak passenger train ticket from Newton to Cleveland, to depart at 2:40 a.m. on December 15, 2000.

Additional facts necessary to resolution of particular legal issues will be discussed below.

Renumbering of Counts in Jury Instructions and Capital Murder Theories

In its instructions to the jury and in the verdict forms, the alternative capital murder counts set forth

in Counts 1 through 8 of the amended complaint were combined into Counts 1 through 4 of capital murder—one for each of the four Birchwood killings—based on alternate theories of guilt under K.S.A. 21-3439(a)(4) (underlying sex crime) or K.S.A. 21-3439(a)(6) (multiple first-degree premeditated murders). At an instructions conference, the State had asserted that it did not matter if the jury was not unanimous on the theory as long as it was unanimous on guilt. A similar combining and renumbering occurred for the alternative counts of aggravated robbery set out in Counts 15 through 22 of the amended complaint. The remaining counts in the amended complaint were renumbered accordingly in the instructions and verdict forms. Accordingly, the 58 charges in the amended complaint were reduced to 50 possible crimes of conviction. For clarity, this opinion consistently uses the count numbers from the amended complaint.

GUILT PHASE ISSUES AND SHORT ANSWERS

We begin our discussion by setting out the questions we answer on the guilt phase of R. Carr's trial. Many of these are also raised by or applicable to J. Carr. We have taken the liberty of reformulating certain questions to focus on their legally significant aspects or effects. We also have reordered questions raised by the defense and have inserted among them unassigned potential errors noted by us, because we believe this organization enhances clarity. We number all questions consecutively, 1 through 27, despite occasional intervening subheadings.

Our statement of each question is followed by a brief statement of its answer.

Issues Affecting All Incidents

1. Did the district judge err in refusing to grant defense motions for change of venue? A majority of six of the court's members answers this question no. One member of the court dissents and writes separately on this issue and its reversibility, standing alone.

2. Did the district judge err in refusing to sever the guilt phase of defendants' trial? A majority of six members of the court answers this question yes. One member of the court dissents and writes separately on this issue. A majority of four members of the court agrees that any error on this issue was not reversible standing alone. Three members of the court dissent, and one of them writes separately for the three on the reversibility question, standing alone.

3. Was it error for the State to pursue conviction of R. Carr for all counts arising out of the three December 2000 incidents in one prosecution? The court unanimously answers this question no.

4. Did the district judge err (a) by excusing prospective juror M.W., who opposed the death penalty, for cause, (b) by failing to excuse allegedly mitigation-impaired jury panel members W.B., D.R., D.Ge., and H.Gu. for cause, or (c) by excusing prospective jurors K.J., M.G., H.D., C.R., D.H., and M.B., who expressed moral or religious reservations about the death penalty, for cause? The court unanimously agrees there was no error on any of these bases.

5. Did the district judge err by rejecting a defense challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct 1712, 90 L. Ed. 2d 69 (1986), to the State's

peremptory strike of juror and eventual foreperson W.B.? The court unanimously answers this question yes. A majority of four members of the court agrees that any error on this issue was not reversible standing alone. Three members of the court dissent, and one of them writes separately for the three on the reversibility question, standing alone.

Issues Specific to Walenta Incident

6. Was the district judge's admission of statements by Walenta through law enforcement error under the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)? The court unanimously answers this question yes. The court unanimously agrees that this error was not reversible standing alone.

7. Was the evidence of attempted aggravated robbery of Walenta sufficient to support R. Carr's felony murder conviction? A majority of four of the court's members answers this question yes. Three members of the court dissent, and one of them writes separately for the three on this issue and its reversibility, standing alone.

8. Did the district judge err by failing to instruct the jury on second-degree murder as a lesser included offense of felony murder of Walenta? The court unanimously answers this question no.

Issues Specific to Quadruple Homicide and Other Birchwood Crimes

9. Did faulty jury instructions on all four K.S.A. 21-3439(a)(4) sex-crime-based capital murders and a multiplicity problem on three of four K.S.A.

21-3439(a)(6) multiple-death capital murders combine to require reversal of three of R. Carr's death-eligible convictions? The court unanimously answers this question yes.

10. Was a special unanimity instruction required for Counts 1, 3, 5, and 7 because of proof of multiple sex crimes underlying each count? The court declines to reach the merits of this issue because it is moot.

11. Must sex crime convictions underlying capital murder Counts 1, 3, 5, and 7 be reversed because they were lesser included offenses of capital murder under K.S.A. 21-3439(a)(4)? The court declines to reach the merits of this issue because it is moot.

12. Was the State's evidence of aggravated burglary sufficient? The court unanimously answers this question yes.

13. Did the State fail to correctly charge and the district judge fail to correctly instruct on coerced victim-on-victim rape and attempted rape, as those crimes are defined by Kansas statutes, rendering R. Carr's convictions on those offenses void for lack of subject matter jurisdiction? The court unanimously answers this question yes.

14. Was the State's evidence of R. Carr's guilt as an aider and abettor on Count 41 for Holly G.'s digital self-penetration sufficient? A majority of four of the court's members answers this question yes. Three members of the court dissent and one of them writes separately for them on this issue and its reversibility.

15. Were Count 41 and Count 42 multiplicitous? The court unanimously answers this question yes. The

court unanimously agrees that this error requires reversal of R. Carr's conviction as an aider and abettor on Count 42.

16. Was the evidence of R. Carr's aiding and abetting of J. Carr's rape of Holly G. and attempted rape and rape of Heather M. sufficient? The court unanimously answers this question yes.

17. Did Count 43 of the charging document confer subject matter jurisdiction to prosecute R. Carr for attempted rape of Heather M.? The court unanimously answers this question yes.

18. Did the district judge misapply the third-party evidence rule and hearsay exceptions, preventing R. Carr from presenting his defense? The court unanimously answers this question yes. The court unanimously agrees that any error on this issue was not reversible standing alone.

19. Was evidence of results from mitochondrial DNA testing of hairs found at the Birchwood home erroneously admitted? The court unanimously answers this question no.

20. Did the district judge err by denying R. Carr's motion for mistrial after evidence developed at trial that R. Carr had genital warts and that the surviving victim, Holly G., contracted HPV after the second intruder she identified as R. Carr raped her? The court unanimously answers this question no.

21. Did the district judge err by failing to instruct on felony murder as a lesser included crime of capital murder? The court unanimously answers this question no.

Other Evidentiary Issues

22. Did the district judge err by automatically excluding eyewitness identification expert testimony proffered by the defense? The court unanimously answers this question yes. The court unanimously agrees that any error on this issue was not reversible standing alone.

23. Did the district judge err by permitting a jury view of locations referenced in evidence, in violation of the defendants' right to be present, right to assistance of counsel, and right to a public trial? The court unanimously answers this question no.

Other Instructional Issues

24. Did the district judge err by failing to include language in the instruction on reliability of eyewitness identifications to ensure that jurors considered possible infirmities in cross-racial identifications? The court unanimously answers this question no.

25. Was the instruction on aiding and abetting erroneous because (a) it permitted jurors to convict the defendants as aiders and abettors for reasonably foreseeable crimes of the other, regardless of whether the State proved the aider and abettor's premeditation, (b) it failed to communicate expressly that an aider and abettor had to possess premeditated intent to kill personally in order to be convicted of capital murder, or (c) it omitted language from K.S.A. 21-3205(2)? The court unanimously answers the first question yes. The court unanimously answers the second question no. The court unanimously answers the third question no. The court unanimously agrees that the error on the first question was not reversible standing alone.

Prosecutorial Misconduct

26. Did one of the prosecutors commit reversible misconduct by telling jurors to place themselves in the position of the victims? The court unanimously answers this question no.

Cumulative Error

27. Did cumulative error deny R. Carr a fair trial on his guilt? A majority of four of the court's members answers this question no. Three members of the court dissent, and one of them writes separately for them on this issue.

1. VENUE

The defendants argue that pretrial publicity was so pervasive and prejudicial in Sedgwick County that it prevented trial by a fair and impartial jury, violating their rights under the Sixth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights, and that District Court Judge Paul Clark abused his discretion by refusing to transfer this case to another county under K.S.A. 22-2616(1). To the extent only one defendant has explicitly raised a particular argument, we consider it on behalf of the other defendant as well under the authority of K.S.A. 21-6619(b).

Additional Factual and Procedural Background

The defendants first moved for a change of venue in March 2002. At a May 28, 2002, evidentiary hearing on their motion, they presented a spring 2002 venue study to demonstrate the depth of media saturation about this case in Sedgwick County.

The study was based on two telephone surveys, one of 401 Sedgwick County residents and one of 200 Wyandotte County residents. Lisa Dahl of Litigation Consultants, Inc., who conducted the surveys, testified that Wyandotte County served as a control county. It was selected because local media coverage of the case had been limited and it was a metropolitan area similar to Sedgwick County in demographic makeup, economy, and crime rates. At the time of the surveys, Sedgwick County had 452,000 residents and Wyandotte County had about 157,000 residents.

The Sedgwick County response rate was 80 percent. Dahl testified that, although the Wyandotte County response rate was lower at 62.89 percent, it nevertheless fell within a range sufficient to provide an accurate representation of the views of the community at large.

The survey showed that 96 percent of the respondents in Sedgwick County were aware of this case, as compared to 29.5 percent in Wyandotte County. Further, 74.1 percent of those surveyed in Sedgwick County held an overall opinion that the defendants were guilty. Approximately half of these respondents said the defendants were "definitely guilty," and the other half said they were "probably guilty." In contrast, 22 percent of the Wyandotte County respondents believed the defendants were "definitely" or "probably" guilty, according to Dahl. Addressing their understanding of the quality of the evidence, 72.3 percent of the Sedgwick County respondents believed it to be "overwhelming" or "strong." Only 16 percent of the Wyandotte County respondents believed likewise.

Personal discussions about this case correlated with more widespread beliefs on the defendants' guilt. Of the 59.1 percent of respondents in Sedgwick County who had engaged in such personal discussions, 86 percent believed that the defendants were "definitely" or "probably" guilty. And, of the 56.4 percent of respondents who had merely overheard such discussions, 82 percent believed the defendants were "definitely" or "probably" guilty.

Dahl also compiled extensive examples of news media coverage of this case, which included both print and online newspaper articles; internet coverage from websites other than those whose content was generated by newspapers; radio coverage, including audio, transcripts and notes from broadcasts, and printouts of stories on their websites; and television footage. Much of the coverage was, not surprisingly, unfavorable to the defendants.

The existence of unfavorable media coverage had been demonstrated in a hearing nearly a year before on the defendants' motion to close proceedings to the media and the Wichita Eagle newspaper's and KWCH-TV's motion to intervene. Thomas David Beisecker, a professor of communication studies at the University of Kansas and president of Advocacy Research Associates, had testified about the content of media coverage in the first few months after the crimes. In addition to describing facts of the crimes and the legal proceedings, Beisecker said, the coverage included discussion of the good character of the victims, R. Carr's parole status and criminal history, and the community's fear and insecurity stemming from the crimes.

Coverage of the crimes in this case was especially intense immediately after the Birchwood crimes and the defendants' arrests. Within 2 days of the crimes the Wichita Eagle had published a story about R. Carr's recent release from jail after his parole violation and detailing his criminal history. The funerals of Heather M., Aaron S., Brad H., and Jason B. were covered extensively. Press coverage and public response to it also focused on fear among Wichita citizens as a result of the string of crimes attributed to the defendants.

Press coverage spiked again when Walenta died on January 2, 2001, and when the amended complaint was filed against the defendants 2 days later. In the months following, various pretrial proceedings such as the April 2001 preliminary hearing and the discovery of the gun used in the crimes prompted additional stories. The 1-year anniversary of the quadruple homicide also prompted media stories.

Measurement of intensity of community opinion was another feature of Dahl's surveys. She testified that the surveys were done more than a year after the crimes and that, if the opinions of members of the public were going to dissipate, they would have done so by the time the telephone calls were placed. Because they had not, she expected that there would be little movement in the opinions evident from the survey results between the time of the survey and the start of the defendants' trial a few months later.

Dahl admitted that her surveys did not explore the question of impartiality and that she was not aware of any studies in her field conclusively establishing that participants in such surveys who voiced opinions on guilt could not ultimately serve as impartial jurors.

After the evidentiary hearing on the motion to change venue, Judge Clark said that he would hear closing arguments from counsel after he had had an opportunity to review the exhibits.

Closing arguments were held on June 13, 2002. Immediately upon the completion of the arguments, Judge Clark spoke. He first found that Dahl was qualified to render an expert opinion and that the venue study was scientifically valid. He then ruled:

> "The argument then comes to the emotionally biasing publicity. The purpose in selecting a jury is not to find a jury free of knowledge. It is to find a jury free of bias and prejudice. The study shows and the evidence shows and experience shows that in this particular case, having reviewed the material furnished, the law[,] and the argument of counsel, that the venue in which the defendants will be assured of the greatest number of venire persons free of bias or prejudice from whom a jury may be selected to decide the case solely on the facts in evidence, viewed by the light of the instruments of law, is Sedgwick County, Kansas. The motion is overruled for both defendants."

In late July 2002, a political committee ran an advertisement on local Wichita television stations supporting the candidacy of Phill Kline for Kansas Attorney General. The advertisement identified R. Carr and labeled him a murderer. Although the advertisement had run in at least one other Kansas media market, it did not identify R. Carr by name in that market.

The ads and reaction to them generated days of coverage on local television news in Wichita and in the Wichita Eagle. Among others quoted was Sedgwick County District Attorney Nola Foulston, the lead prosecutor on the case. She said that "placing this ad in front of a constituency of individuals in our community that are the same people that are going to form a jury pool could have a devastating effect."

The Kline ad and related media prompted the defendants to renew their motion to change venue, and Judge Clark held another hearing on the subject on August 2, 2002. Again, he rejected the defendants' arguments.

Judge Clark's second oral ruling was even more brief than his first: "I . know that on venue and fair trial and the ability to have a jury that will be fair, that's determined by a questioning process we will try here first. I will overrule the motion. If it can't be done, we will have a fair trial before this is over, one way or the other. That's all I have on the motions." His written order denying the renewed motion said that he found the evidence was "not clear that a fair, impartial jury cannot be selected."

In the month voir dire was to begin in September 2002, prospective jurors completed sworn questionnaires that inquired about their exposure to pretrial publicity and whether any opinions they held on the case were so set that they would not be able to set them aside. According to the questionnaire responses, 92 percent of the prospective jurors had been exposed to pretrial publicity on this case.

Judge Clark began voir dire on September 9, 2002, prepared to examine up to nine panels of 20 prospective jurors each until 60 were qualified for final selection. He began by excusing a handful of prospective jurors based on their questionnaire responses. He then conducted general voir dire, excusing several prospective jurors for reasons unrelated to pretrial publicity.

At the conclusion of general voir dire, Judge Clark permitted individual voir dire on the subjects of racial prejudice, pretrial publicity, and the death penalty. After individual voir dire of 86 prospective jurors, a panel of 60, plus a panel of 8 prospective alternates, was established.

Nearly all 86 prospective jurors examined individually had been exposed to at least some publicity regarding the case. Several mentioned seeing articles about the case within days before the beginning of jury selection.

Fifty-two of the 86 said they had formed no opinion about the case. Of the 34 who said they had formed opinions about the case, all but three said they could set them aside, presume the defendants' innocence, and decide the case only on the evidence.

The defendants challenged 11 of the 86 prospective jurors for cause in whole or in part because of preconceived opinions of guilt. Judge Clark overruled 10 out of 11 of these challenges, relying on the prospective jurors' statements that they could set their opinions aside and decide the case impartially on the evidence presented.

Jury selection lasted 19 days.

Of the 12 jurors seated after the parties exercised their peremptory challenges, 11 had been exposed to some degree of pretrial publicity; 5 of the 11 said that their exposure was minimal.

Eight of the 12 said they had formed no opinion on the defendants' guilt; 4 had admitted during individual voir dire that they believed the defendants were guilty based on pretrial publicity: D.G., D.M., T.N., and J.S.

The defense had unsuccessfully challenged D.G. for cause. D.G. said that he had heard about the case from television and the newspaper. He had some difficulty recalling the details of the media coverage because of the passage of time since the crimes. Based on how the events were portrayed in media coverage, it appeared to him that the defendants were guilty. He continued to believe that until he was called to jury duty and asked whether he could keep an open mind. In his responses to the questionnaire, D.G. said without equivocation that he could set his opinion aside. During individual voir dire, one of the prosecutors asked him if he understood that it would be improper for a juror to consider outside information when deciding the case, and D.G. responded, "Hopefully, I can separate the two and just try to hear the facts and evidence presented." The prosecutor suggested that D.G.'s use of the word "hopefully" might cause some to question the strength of his conviction and then asked D.G. a series of follow-up questions. D.G. said he agreed that the defendants were entitled to an impartial jury; acknowledged he would have to base his decision on the evidence, even if it conflicted with information from pretrial publicity; and said he would have no problem doing so. Several of D.G.'s statements were made in

response to leading questions, such as this from the prosecution: "And you would agree with me that the defendants are entitled to a jury that could decide their case based upon what is presented here in court?" In response to questioning from R. Carr's counsel, D.G. confirmed his ability to consider only admitted evidence. But, later in the questioning, he occasionally said he would "hope" and "try" to set aside what he had learned from pretrial publicity.

The defense had also unsuccessfully challenged D.M. for cause. D.M. was exposed to television and newspaper coverage. Based on the coverage, D.M. said that he "suppose[d]" he had an opinion that would "lean toward guilt." He said that he understood it would be improper to rely on information from outside the courtroom in making a decision. Then the prosecution asked: "And so you wouldn't do that, would you?" And D.M. said that he "hopefully [would] not" do so. Again, the prosecutor explained that "hopefully" might not be good enough and that justice required a definitive answer. At that point, D.M. said, "Ah, yes. I believe I could put it aside, yes—what I've heard." D.M. agreed that media coverage could be incomplete or inaccurate and that it would be unfair to find a defendant guilty on such information. In response to questions from defendants' counsel, D.M. again confirmed his ability to set aside his previous opinion.

The defense had passed T.N. for cause. T.N said she believed R. Carr and J. Carr were guilty based on coverage in the newspaper. She expressed confidence she could set that opinion aside and said she would not convict someone based on information she read in the press. She said she understood that the media may not

be privy to all of the facts and that it would be unfair to base her decision on such information. Some of T.N.'s statements responded to leading questions, such as this from the prosecution, "So you will not convict somebody based on what you may have read in the newspaper?" In response to questions from defense counsel, T.N. again confirmed that she could set aside her opinion and the information she acquired from pretrial publicity.

The defense had unsuccessfully challenged J.S. for cause. J.S. was exposed to pretrial publicity about the time the defendants were arrested. When asked whether he had formed an opinion of guilt based on the coverage, J.S. said, "Well, yeah, not really based on anything, just, you know, kind of the idea that somebody gets arrested there is bound to be evidence against them." J.S. said that he understood not all persons arrested are guilty—an awareness that would make it easier for him to set his opinion aside. J.S. said that he would make a decision based solely on the evidence.

After voir dire was completed, the defendants orally renewed their motion for change of venue once more, arguing that the process of jury selection demonstrated that pretrial publicity had tainted the pool. Judge Clark overruled the motion, saying that jury selection confirmed "the contrary."

The trial was televised, but Judge Clark restricted media access to evidence, made sure that microphones would not pick up the defendants' confidential discussions with counsel, and allowed witnesses to decide whether their voices or images could be published or broadcast. The judge reserved six seats

inside the courtroom for members of the press. He admonished jurors not to pay attention to any of the publicity surrounding the case during jury selection and again at trial. The record does not suggest that the media created any disruption or otherwise interfered with the judge's conduct of the proceedings.

Items identified during testimony as belonging to the victims included Aaron S.'s Koch Industries business card; a ring that Heather M., a teacher, had bought while on a choir tour in Europe; Heather M.'s Catholic Family Credit Union debit card; and Brad H.'s Koch identification card. In describing the state of Aaron S.'s ransacked bedroom, an investigator testified that she had seen an envelope containing cash and checks "that were meant for a ski trip that he was planning for the youth organization in church." Next to a toppled clock were some prayer books and religious material.

The jury knew that R. Carr was charged with three counts of criminal possession of a firearm for possessing a gun within 10 years after being convicted of a felony. Donley testified that he was unemployed and made money fighting his dog. In addition, R. Carr's attorney elicited testimony from Donley that R. Carr sold illegal drugs.

General Legal Framework and Standards of Review

The defendants argue that Judge Clark's refusal to grant a change of venue violated their right to an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution and under Section 10 of the Kansas Constitution Bill of Rights. They also argue that the judge abused his

discretion under the Kansas statute governing change of venue, K.S.A. 22-2616(1).

The Sixth Amendment guarantees an accused "[i]n all criminal prosecutions" the right to a trial by "an impartial jury." U.S. Const. amend. VI. This protection is incorporated into and made applicable to the states through the due process provision of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

The Kansas Constitution includes a similarly worded guarantee for its citizens in Section 10 of the Bill of Rights, which recognizes a defendant's right to a speedy and public trial "by an impartial jury of the county or district in which the offense is alleged to have been committed." We have not previously analyzed our state constitutional language differently from the federal provision. See *State v. Hall*, 220 Kan. 712, 714, 556 P.2d 413 (1976). And neither the defendants nor the State urge us to do so today.

In addition, K.S.A. 22-2616(1) gives Kansans a vehicle to obtain a change of venue to prevent a local community's hostility or preconceived opinion on a defendant's guilt from hijacking his or her criminal trial:

> "In any prosecution, the court upon motion of the defendant shall order that the case be transferred as to him to another county or district if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that county."

The United States Supreme Court has examined Sixth Amendment venue challenges based on pretrial publicity in two contexts. *Goss v. Nelson*, 439 F.3d 621, 628-29 (10th Cir. 2006) (citing *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 [1963] [presumed prejudice]; *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 [1961] [actual prejudice]).

"The first context occurs where the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community. We 'presume prejudice' before trial in those cases, and a venue change is necessary." 439 F.3d at 628. "In such cases, a trial court is permitted to transfer venue without conducting voir dire of prospective jurors." *House v. Hatch*, 527 F.3d 1010, 1023-24 (10th Cir. 2008).

The second context, "actual prejudice," occurs "where the effect of pretrial publicity manifested at jury selection is so substantial as to taint the entire jury pool." *Goss*, 439 F.3d at 628; see *Gardner v. Galetka*, 568 F.3d 862, 888 (10th Cir. 2009). "In cases of actual prejudice, 'the voir dire testimony and the record of publicity [must] reveal the kind of wave of public passion that would have made a fair trial unlikely by the jury that was impaneled as a whole.' [Citation omitted.]" *Hatch*, 527 F.3d at 1024.

As Professor Wayne R. LaFave and his colleagues have written, a claim that pretrial publicity has so tainted prospective jurors as to make a fair trial impossible cannot be "determined solely by the standards prescribed in the venue change statute or court rule. The federal constitution may also play a significant role." See 6 LaFave, Israel, King, & Kerr

Criminal Procedure, § 23.2(a) (3d ed. 2007). And, when in conflict, even constitutionally based provisions on the location of criminal trials must yield to those establishing a defendant's right to an impartial jury. *Skilling v. United States*, 561 U.S. 358, 378, 130 S. Ct. 2896 177 L. Ed. 2d 619 (2010) ("The Constitution's place-of-trial prescriptions do not impede transfer of the proceedings to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial."); *United States v. McVeigh*, 918 F. Supp. 1467, 1469 (W.D. Okla. 1996) ("right to an impartial jury in the Sixth Amendment will override the place of trial provisions in both Article III and the Sixth Amendment in extraordinary cases"). The same certainly is true about the relationship between the fair trial provisions of the federal Constitution on the one hand and state constitutional and statutory provisions prescribing the ordinary venue for criminal trials, see, *e.g.*, Kan. Const. Bill of Rights, § 10 (granting right to speedy public trial by impartial jury of county, district where offense allegedly committed), on the other hand. The federal Constitution is supreme.

The defendants invoke both presumed prejudice and actual prejudice in this case. They agree with the State that our traditional standard of review on denial of a motion to change venue has been abuse of discretion. See *State v. Higgenbotham*, 271 Kan. 582, 591, 23 P.3d 874 (2001) (citing *State v. Cravatt*, 267 Kan. 314, 336, 979 P.2d 679 [1999]). But they also urge us to consider whether an unlimited standard of review may be appropriate under *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) ("trial courts must take strong measures to ensure" that

defendants tried by impartial jury free from outside influences; appellate courts "have the duty to make an independent evaluation of the circumstances"), and our statutory duty to determine whether a sentence of death "was imposed under the influence of passion, prejudice or other arbitrary factor," K.S.A. 2013 Supp. 21-6619(c)(1).

Because we have not previously been precise about how analysis of presumed prejudice differs from analysis of actual prejudice, about how the two theories are supported by and applied under the federal and state constitutions and in concert with our state venue change statute, or about how our standard of review on appeal may be affected, we begin our discussion of the defendants' venue challenge by tearing apart and then reassembling these concepts.

We follow many of our sister state courts into this particular breach. See *Crowe v. State*, 435 So. 2d 1371, 1376 (Ala. Crim. App. 1983) (pretrial publicity warrants venue change when defendant can show presumed, actual prejudice); *State v. Atwood*, 171 Ariz. 576, 631, 832 P.2d 593 (1992) (prejudice from publicity may be presumed in rare instances); *People v. Loscutoff*, 661 P.2d 274, 276 (Colo. 1983) (identifying actual, presumed prejudice as alternative theories warranting venue change); *State v. Sostre*, 48 Conn. Supp. 82, 85, 830 A.2d 1212 (Super. Ct. 2002) (same); *Sykes v. State*, 953 A.2d 261, 272 (Del. 2008) (relief under venue statute may be satisfied under either presumed, actual prejudice theory); *Noe v. State*, 586 So. 2d 371, 379 (Fla. Dist. App. 1991) (recognizing presumed, inherent prejudice as basis for venue change); *Isaacs v. State*, 259 Ga. 717, 726, 386 S.E.2d

316 (1989) (analyzing presumed prejudice as basis for venue change); *State v. Fee*, 124 Idaho 170, 175, 857 P.2d 649 (Ct. App. 1993) (recognizing separate theories of presumed, actual prejudice available to demonstrate grounds for requested venue change); *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985) (same); *Watkins v. Commonwealth*, 2008-SC-000798-MR, 2011 WL 1641764, at *13 (Ky. 2011) (unpublished opinion) (same), *cert. denied* 132 S. Ct. 1580 (2012) (showing of actual prejudice unnecessary when prejudice can be presumed); *State v. Goodson*, 412 So. 2d 1077, 1080 (La. 1982) (reviewing statutory venue challenge under federal standards established for actual, presumed prejudice); *State v. Chesnel*, 1999 Me. 120, 734 A.2d 1131, 1134 (1999) (recognizing actual, presumed prejudice as separate theories); *Commonwealth v. Toolan*, 460 Mass. 452, 462, 951 N.E.2d 903 (2011) (same); *State v. Everett*, 472 N.W.2d 864, 866 (Minn. 1991) (analyzing evidence for presumed, actual prejudice); *State v. Kingman*, 362 Mont. 330, 344, 264 P.3d 1104 (2011) ("As the basis of a motion for change of venue, the defendant may allege presumed prejudice, actual prejudice, or both."); *State v. Smart*, 136 N.H. 639, 647, 622 A.2d 1197 (1993) (same); *State v. Biegenwald*, 106 N.J. 13, 33, 524 A.2d 130 (1987) (applying different standards to claims of presumed, actual prejudice); *State v. House*, 127 N.M. 151, 166, 978 P.2d 967 (Ct. App. 1999) (recognizing distinction between actual, presumed prejudice); *State v. Knight*, 81AP-257, 1981 WL 11437 (Ohio App. 1981) (unpublished opinion) (describing evidentiary standard for presumed prejudice claims); *State v. Fanus*, 336 Or. 63, 78, 79 P.3d 847 (2003) (citing United States Supreme Court authority for presumed, actual prejudice); *Commonwealth v. Briggs*, 608 Pa. 430, 468,

12 A.3d 291 (2011), *cert. denied* 132 S. Ct. 267, 181 L. Ed. 2d 157 (2011) (acknowledging doctrine of presumed prejudice as alternative to actual prejudice); *Crawford v. State*, 685 S.W.2d 343, 350 (Tex. App. 1984), *aff'd and remanded* 696 S.W.2d 903 (Tex. Crim. 1985) ("Pretrial publicity will entitle a defendant to a venue change if he can show either (1) news media coverage so damaging that it must be presumed no unbiased jury could be selected, or (2) from the totality of circumstances, actual prejudice."); *McBride v. State*, 477 A.2d 174, 185 (Del. 1984) (same); *State v. Snook*, 18 Wash. App. 339, 349, 567 P.2d 687 (1977) (actual prejudice need not be shown where inherent, presumed prejudice exists); *Sanchez v. State*, 142 P.3d 1134, 1139 (Wyo. 2006) (recognizing presumed prejudice rarely invoked, applicable only in extreme circumstances).

Presumed Prejudice

The presumed prejudice doctrine originated in *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963).

In *Rideau*, law enforcement filmed the confession of defendant Wilbert Rideau to a bank robbery, kidnapping, and murder in Calcasieu Parish, a community of approximately 150,000. Local television stations broadcast the confession, reaching approximately 24,000 people in the community the first day, 53,000 the following day, and 29,000 the day after that. Rideau was convicted at a jury trial and sentenced to death. His jury included three persons who had seen the confession on television and two deputy sheriffs from Calcasieu Parish. 373 U.S. at 723-25.

The Court presumed the existence of prejudice necessitating reversal of Rideau's convictions without considering what was said by panel members during voir dire.

> "For anyone who has ever watched television[,] the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.
>
> "'[N]o such practice as that disclosed by this record shall send any accused to his death.'" *Rideau*, 373 U.S. at 726-27 (quoting *Chambers v. Florida*, 309 U.S. 227, 241, 60 S. Ct. 472, 84 L. Ed. 716 [1940]).

The Court invoked the doctrine of presumed prejudice again in *Estes v. Texas*, 381 U.S. 532, 538, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), when extensive publicity before trial swelled into excessive media involvement and exposure during preliminary court proceedings. Reporters and television production crews overran the courtroom and bombarded the viewing public with the sights and sounds of the hearing. These led to disruption during proceedings and, according to the Court, denied defendant Billie Sol Estes the "judicial serenity and calm to which [he] was entitled." 381 U.S. at 536.

In *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), the Supreme Court

presumed prejudice after pervasive, highly prejudicial publicity combined with a circus-like environment during the trial of defendant Samuel H. Sheppard, who was accused of bludgeoning his pregnant wife to death.

The media assumed an intensively active role from the outset of the sensational *Sheppard* case. Before trial, the press reported on the defendant's refusal to take a lie detector test or be injected with a "truth serum." 384 U.S. at 338-39. At trial, the courtroom overflowed with members of the press. Their presence inside the bar limited Sheppard's ability to engage in confidential discussions with his counsel, and they roamed freely around the courtroom, at times creating so much noise that the presiding judge and the jury could not hear witnesses' testimony. 384 U.S. at 344. The judge permitted the local newspaper to publish the names and addresses of each juror, exposing them "to expressions of opinion from both cranks and friends." 384 U.S. at 353. The judge's admonitions to jurors was better characterized as "suggestions" or "requests" to avoid exposure to press coverage, and "bedlam reigned," the Court said, thrusting jurors "into the role of celebrities." 384 U.S. at 353, 355.

In reversing Sheppard's murder conviction, the Court stated that publicity alone may not be sufficient to warrant relief, but, when it combines with a judge's inability or lack of desire to control courtroom proceedings, violation of a defendant's right to a fair trial is readily apparent. 384 U.S. at 354-58.

Since *Sheppard*, federal courts have refined the parameters of presumed prejudice claims, setting an extremely high standard for relief. *United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998),

disapproved on other grounds by Hooks v. Ward, 184 F.3d 1206 (10th Cir. 1999). A "court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial." *McVeigh*, 153 F.3d at 1181. Reversal of a conviction will occur only "where publicity 'created either a circus atmosphere in the court room or a lynch mob mentality such that it would be impossible to receive a fair trial.'" *Goss v. Nelson*, 439 F.3d 621, 628 (10th Cir. 2006), (quoting *Hale v. Gibson*, 227 F.3d 1298, 1332 [10th Cir. 2000]); *McVeigh*, 153 F.3d at 1181.

For its part, in its most recent review of a presumed prejudice question, the United States Supreme Court has identified seven relevant factors to be evaluated: (1) media interference with courtroom proceedings; (2) the magnitude and tone of the coverage; (3) the size and characteristics of the community in which the crime occurred; (4) the amount of time that elapsed between the crime and the trial; (5) the jury's verdict; (6) the impact of the crime on the community; and (7) the effect, if any, of a codefendant's publicized decision to plead guilty. See *Skilling v. United States*, 561 U.S. 358, 381-85, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010); *United States v. Mitchell*, 752 F. Supp. 2d 1216, 1220 (D. Utah 2010) (recognizing, applying *Skilling* factors).

The federal appellate courts have been split on the appropriate standard of review for presumed prejudice claims.

The Tenth and Fifth Circuits apply de novo review, based on the directive from *Sheppard* relied upon by defendants here: appellate courts must conduct an

"independent evaluation" of the circumstances. See *McVeigh*, 153 F.3d at 1179; *United States v. Skilling*, 554 F.3d 529, 557-58 (5th Cir. 2009), *aff'd in part, vacated in part, and remanded by* 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010).

But a majority of the federal circuits, all but one in an opinion filed before *Skilling* was decided by the United States Supreme Court, have reviewed presumed prejudice claims for abuse of discretion. See *United States v. Misla-Aldarondo*, 478 F.3d 52, 58-59 (1st Cir. 2007); *United States v. Sabhnani*, 599 F.3d 215, 232-34 (2d Cir. 2010); *United States v. Inigo*, 925 F.2d 641, 654-55 (3d Cir. 1991); *United States v. Higgs*, 353 F.3d 281, 307-09 (4th Cir. 2003); *United States v. Jamieson*, 427 F.3d 394, 412-13 (6th Cir. 2005); *United States v. Nettles*, 476 F.3d 508, 513-15 (7th Cir. 2007); *United States v. Rodriguez*, 581 F.3d 775, 784-86 (8th Cir. 2009); *United States v. Collins*, 109 F.3d 1413, 1416 (9th Cir. 1997); *United States v. Langford*, 647 F.3d 1309, 1319, 1332-34 (11th Cir. 2011).

The Montana Supreme Court recently addressed the standard of review question in *State v. Kingman*, and it elected to follow the abuse-of-discretion majority. 362 Mont. 330, 347, 264 P.3d 1104 (2011). The court acknowledged the position of the Tenth and Fifth Circuits, but it held that they failed to offer a "satisfactory explanation for why a trial court is accorded greater deference in evaluating actual prejudice than it is accorded in evaluating presumed prejudice." 362 Mont. at 346. It reasoned that an abuse of discretion standard is more appropriate than de novo review because the "trial judge is uniquely positioned

to assess whether a change of venue is called for due to prejudice in the community." 362 Mont. at 347.

We disagree with the Montana Supreme Court and the apparent majority among the federal appellate courts; we do see room for difference in the standard of review applied to presumed prejudice and actual prejudice claims, because presumed prejudice does not consider voir dire conducted in the presence of the trial judge. But we also disagree with the Tenth and Fifth Circuits.

In our view, a mixed standard of review must apply to a presumed prejudice challenge on appeal. The factors enumerated by the United States Supreme Court in *Skilling* require fact findings, whether explicit or necessarily implied, that we must review for support by substantial competent evidence in the record. If such evidence exists, we defer on the fact finding. However, overall weighing of the factors calls for a conclusion of law, and we must review the conclusion of law under a de novo standard.

We hasten to note that this pattern of review is far from revolutionary. Such a mixed standard is commonplace. It governs our evaluation of the voluntariness of a criminal defendant's confession and the existence of probable cause or reasonable suspicion, for example. Moreover, it is a close analytical relative of the way in which our examination of district court judge decisions for abuse of discretion has evolved:

> "Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an

> error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594, 182 L. Ed. 2d 205 (2012) (citing *State v. Gonzalez*, 290 Kan. 747, 755-56, 234 P.3d 1 [2010]).

In other words, even our deferential abuse of discretion standard presupposes unlimited review of any legal conclusion upon which a discretionary ruling is based. See *Gonzalez*, 290 Kan. 747, Syl. ¶ 3; see also *State v. Shopteese*, 283 Kan. 331, 340, 153 P.3d 1208 (2007) (discretionary decision must be within trial court's discretion, take into account applicable legal standards); *State v. White*, 279 Kan. 326, 332, 109 P.3d 1199 (2005) (application of abuse of discretion standard of review does not make mistake of law beyond appellate correction).

We now turn to examination of the *Skilling* presumed prejudice factors in this specific case, as of the three points in time when Judge Clark rejected a defense motion for change of venue.

First Motion for Change of Venue

Judge Clark's rulings on the three motions for change of venue were nothing if not pithy. He did not expressly mention the possibility of presumed prejudice rather than actual prejudice, and he made no discrete factual findings in support of any decision on presumed prejudice.

But, on the record before us, defendants never sought a more complete recitation or writing to explain Judge Clark's venue rulings; and, if they thought the findings were insufficient for appellate review, they had an obligation to do so. See *Fischer v. State*, 296 Kan. 808, 825, 295 P.3d 560 (2013) (Notwithstanding district judge's duties under Supreme Court Rule 165 [2013 Kan. Ct. R. Annot. 265], "a party also has the obligation to object to inadequate findings of fact and conclusions of law in order to preserve an issue for appeal because this gives the trial court an opportunity to correct any findings or conclusions that are argued to be inadequate."). We therefore assume that Judge Clark made the necessary factual findings to support his decision to deny a change of venue on any and all theories. See *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 361, 277 P.3d 1062 (2012) (when party fails to object to adequacy of district judge's findings, conclusions, appellate court can presume judge found all facts necessary to support judgment).

The first factor to be examined for presumed prejudice under *Skilling* is media interference with courtroom proceedings. As mentioned above, there is no suggestion in the record that any media representative interfered with courtroom administration in this case at any time, including the period leading up to Judge Clark's consideration of the first motion for change of venue. In each of the cases in which the United States Supreme Court has presumed prejudice and overturned a conviction, it did so in part because the prosecution's "'atmosphere was utterly corrupted by press coverage.'" *Skilling*, 561 U.S. at 380. There was no such atmosphere here and this factor weighed against

presuming prejudice at the time of the ruling on the defendants' first motion.

The second *Skilling* factor is the magnitude and tone of the coverage. The magnitude of the coverage of the crimes and this prosecution was extremely high. But the Sixth Amendment does not demand juror ignorance. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *Goss*, 439 F.3d at 627. "[S]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Irvin*, 366 U.S. at 722. For these reasons, "[e]xtensive pretrial media coverage of a crime alone has never established prejudice per se." *State v. Dunn*, 243 Kan. 414, 424, 758 P.2d 718 (1988) (citing *State v. Ruebke*, 240 Kan. 493, 500, 731 P.2d 842 [1987]; *State v. Porter*, 223 Kan. 114, 117, 574 P.2d 187 [1977]). "'[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.'" *Skilling*, 561 U.S. at 384 (quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554, 96 S. Ct. 2791, 49 L. Ed. 2d 683 [1976]).

Our review of the tone of at least the mainstream press coverage likely to reach a wide audience leads us to the conclusion that it was more factual than gratuitously lurid. See *United States v. Angiulo*, 897 F.2d 1169, 1181 (1st Cir. 1990) (where media coverage tends to be more "factual as opposed to inflammatory or sensational, this undermines any claim for a presumption of prejudice"). Although the coverage occasionally disclosed facts that would be inadmissible at trial, the State argues persuasively that some evidence of the victims' good character and community involvement and of R. Carr's criminal behavior would

later be properly admitted—for example, the teaching and youth leadership of Heather M., Aaron S., Jason B., and Holly G. and the dog fighting and drug sales of R. Carr. Further, the United States Supreme Court has clarified that the presumed prejudice doctrine "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975); see *Stafford v. Saffle*, 34 F.3d 1557, 1566 (10th Cir. 1994) (pervasive pretrial publicity relating to defendant's prior conviction for killing six people during armed robbery not presumptively prejudicial; "nothing in the record to suggest that this publicity was anything other than factual reporting"); *United States v. Abello-Silva*, 948 F.2d 1168, 1177 (10th Cir. 1991) (no prejudice presumed when press coverage consisted primarily of facts gathered from public records, pretrial hearings); *United States v. Flores-Elias*, 650 F.2d 1149, 1150 (9th Cir. 1981) (fact-based publicity focusing largely on victims, their unfortunate plight did not establish prejudice against defendant so great that fair, impartial trial not possible).

Finally, as we have observed many times when considering a defendant's challenge to the admission of gruesome photographs of a crime scene or an ensuing autopsy of a victim into evidence, gruesome crimes give rise to gruesome photographs. See, *e.g.*, *State v. Green*, 274 Kan. 145, 148, 48 P.3d 1276 (2002) ("Gruesome crimes result in gruesome photographs."). Likewise, a quadruple execution-style homicide and an attempted first-degree premeditated murder preceded by hours of

coerced sex acts and robberies naturally gives rise to press coverage that some may fairly characterize as at least occasionally sensational. It can hardly help but be so. See *State v. Ruebke*, 240 Kan. at 500-01 (court unwilling to adopt pretrial publicity rule that individual can commit crime so heinous "that news coverage generated by that act will not allow the perpetrator to be brought to trial"). Yet, overall, we conclude that the primarily factual tone of the press coverage reviewed by Judge Clark at the time of the defendants' first motion compensated for its sheer magnitude, and the second *Skilling* factor did not weigh in favor of presumed prejudice.

The third *Skilling* factor, the size and characteristics of the community in which the crimes occurred, did not weigh in favor of granting the defendants' first motion for change of venue on the ground of presumed prejudice. Laying claim to 452,000 residents and the largest city in Kansas, Sedgwick County had the largest population in the state from which to draw potential jurors. Compare *Skilling*, 561 U.S. at 382 (large Houston population, with 4.5 million potential jurors, minimized potential for presumed prejudice) and *Mu'Min v. Virginia*, 500 U.S. 415, 429, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991) (potential for prejudice mitigated by size of metropolitan Washington, D.C., statistical area; population of more than 3 million among whom hundreds of murders committed each year), with *Rideau*, 373 U.S. at 724-25 (recognizing greater potential for prejudice in parish with 150,000 residents, where confession broadcast to audience of nearly 100,000 over 3-day period). The United States Supreme Court and at least one federal district court and one state supreme court have noted

population sizes similar to Sedgwick County on the way to concluding that the risk of prejudice was diminished. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991) (reduced likelihood of prejudice when venire drawn from pool of more than 600,000); *United States v. Diehl-Armstrong*, 739 F Supp. 2d 786, 793-94, 807 (W.D. Pa. 2010) (no presumed prejudice, in part because jury drawn from community with total population of 545,615); *State v. Gribble*, 165 N.H. 1, 19-20, 66 A.3d 1194 (2013) (potential for prejudice mitigated by jury pool of more than 400,000 residents).

The fourth *Skilling* factor is the time that elapsed between the crime and the trial. At the time the first motion to change venue was ruled upon, 17 months had passed since the crimes were committed. Approximately 3 and 1/2 months remained before voir dire would begin. In the ordinary case, one might expect these time frames to mean that public interest in the crimes and the defendants had begun to wane and that it would continue to do so. See *United States v. Lehder-Rivas*, 955 F.2d 1510, 1524 (11th Cir. 1992) ("The substantial lapse of time between the peak publicity and the trial also weighs against a finding of prejudice.") (citing *Nebraska Press Ass'n*, 427 U.S. at 554); *State v. Sanger*, 108 Idaho 910, 913, 702 P.2d 1370, 1373 (Ct. App. 1985) (lapse of 17 months substantially minimizes prejudice). But Dahl testified about the staying power of the relevant press coverage and the extreme public opinions it fostered. Although she expected her surveys to demonstrate marked dissipation by spring 2002, she found less than expected. We consider this factor inconclusive on

presumed prejudice at the time Judge Clark ruled on the defendants' first motion for change of venue.

The jury's verdict is the fifth *Skilling* factor. It was unknown at the time that Judge Clark ruled on the defendants' first motion for change of venue.

The sixth *Skilling* factor is the impact of the crimes on the community.

The defendants' evidence in support of their first motion included strongly hostile statements by members of the public in response to press coverage of the crimes and the prosecution, typically appearing in reader comments sections or on websites, at least some of which appear to have been sponsored by extreme and/or racist groups. It is difficult to extrapolate from these individual comments to the impact on the public as a whole. See *Gribble*, 66 A.3d at 1208 (defendant's reliance on articles quoting residents who expressed anger, bewilderment, heartbreak over crimes "fails to demonstrate. how the sentiment expressed by a small number of residents in a county with over 400,000 residents is indicative of presumed prejudice in the potential jury pool"). And the Supreme Court has observed that venue changes have been granted in highly charged cases like "the prosecution arising from the bombing of the Alfred P Murrah Federal Office Building in Oklahoma City," while courts have properly denied such requests in other "cases involving substantial pretrial publicity and community impact, for example, the prosecutions resulting from the 1993 World Trade Center bombing and the prosecution of John Walker Lindh, referred to in the press as the American Taliban." *Skilling*, 561 U.S. at 378 n.11.

Still, certain press stories collected by Dahl and entered as exhibits in the evidentiary hearing on the defendants' first motion documented more widespread public reaction to the crimes. For example, the Wichita Eagle reported on increased numbers of security system purchases in the wake of the Birchwood home invasion. We conclude that this sixth factor weighed in favor of presumed prejudice at the time Judge Clark considered the defendants' first motion for change of venue.

The seventh *Skilling* factor, publicity given to a codefendant's confession, would never be applicable in this case, because neither defendant confessed to any of the crimes with which they were jointly charged. The pretrial publicity before Judge Clark at the time of the first motion thus lacked the smoking-gun type of information the Supreme Court has found to be uniquely prejudicial. See *Rideau*, 373 U.S. at 726 (publicity given to filmed confession "in a very real sense was Rideau's trial—at which he pleaded guilty"); *Sheppard v. Maxwell*, 384 U.S. 333, 338-39, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) (discussing impact of reports of defendant's refusal to take lie detector test); *Irvin v. Dowd*, 366 U.S. 717, 725-26, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (discussing prejudice from defendant's offer to plead guilty to avoid death penalty). The absence of publicity about smoking-gun evidence weighed against presumed prejudice at the time the defendants' first motion was considered. See *Skilling*, 561 U.S. at 382-83 (lack of smoking-gun type of evidence in pretrial coverage made it less memorable, mitigated prejudgment).

Our review of all of the *Skilling* factors at the time of the first motion leads us to conclude that, on balance, there was no presumed prejudice compelling Judge Clark to transfer venue of this case to another county.

We are not persuaded by the defendants' reliance upon *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), to support their argument for presumed prejudice. In that case, two law enforcement officers, Dennis Doty and Phil Trust, were shot and killed while attempting to execute an arrest warrant for defendant Jackson Chambers Daniels, Jr.

> "The murders of Doty and Trust generated extensive and nearly continuous publicity immediately after the shootings and again before Daniels's trial. [Citation omitted.] Articles described SWAT team searches of the neighborhood where Daniels was hiding. "News accounts described the perpetrator as a Black paraplegic, and Daniels was identified in press accounts as the killer from the very beginning.
>
> "Although the publicity diminished after Daniels's arrest, it resumed as trial approached. Three months before the trial, news articles covered the local school board's proposal to rename its football stadium in honor of officer Doty. One month before Daniels's trial was to begin, on the anniversary of the killings, a statue commemorating fallen police officers was unveiled by the county. The publicity surrounding the memorial and its unveiling ceremony largely referred to officers Trust and Doty. The memorial statue, standing nine feet

tall, was located across the street from the Riverside County courthouse where Daniels was tried.

"Based on our review of the California Supreme Court's findings, the public's response to this publicity clearly amounted to a 'huge' wave of public passion. As the California Supreme Court described it, police stations were 'deluged' with calls from citizens offering tips on the investigation and offering to establish a memorial fund. In addition, local newspapers printed numerous letters from readers calling for Daniels's execution. The officers were turned into 'posthumous celebrities,' and approximately three thousand people attended their funerals. That the news coverage saturated the county is reflected in the fact that eighty-seven percent of the jury pool recognized the case from the media coverage. Two-thirds of those empaneled remembered the case from the press accounts-some recalled that the suspect was a Black paraplegic, others recalled that police officers were shot, and two jurors remembered Daniels by name.

"The press accounts did not merely relate factual details, but included editorials and letters to the editor calling for Daniels's execution. In addition, news articles reflected the prosecution's theory of the case by attributing the killings to Daniels's desire to escape justice. Also well-publicized by the press was Daniels's past criminal offenses, including an arrest for shooting at a police officer. Such

> information was highly prejudicial and would not have been admissible at the guilt phase of Daniels's trial." 428 F.3d 1211-12.

Based on these facts, the Ninth Circuit presumed prejudice and held that "[t]he nature and extent of the pretrial publicity, paired with the fact that the majority of actual and potential jurors remembered the pretrial publicity, warranted a change of venue," and the refusal to transfer the case "violated Daniels's right to a fair and impartial jury and thus, his right to due process." 428 F.3d at 1212.

The defendants are correct that their case and *Daniels* shared certain characteristics—extensive coverage and citizen awareness; publication of reader viewpoints, some of which demanded vengeance for the victims' murders; and reporting of some facts that would be inadmissible at trial. But the impact on and response from the community was considerably greater in *Daniels*, where the victims were police officers killed in the line of duty, and community sentiment was so strong that monuments were constructed in their honor.

We also are not persuaded by *Daniels* because it appears to be somewhat behind the United States Supreme Court's most recent discussion of presumed prejudice in *Skilling*. Had the judges who decided *Daniels* had the benefit of *Skilling* at the time they filed their opinion, they may not have relied so heavily on extensive media coverage and a high level of community familiarity to reach their result. *Skilling* makes clear that more is needed before the Sixth Amendment requires a change of venue because of presumed prejudice.

Daniels also appears to be out of step among other Ninth Circuit decisions. See *Hayes v. Ayers*, 632 F.3d 500, 509 (9th Cir. 2011) (no presumed prejudice even though "stories about [defendant Royal Kenneth] Hayes were unflattering and included inadmissible evidence"; stories "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"); *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998) (no presumed prejudice in death penalty case despite stories portraying victim as sympathetic, disclosing defendant's criminal history; coverage accurate, factual); *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1988) (no presumed prejudice in death penalty case despite media coverage of defendant's confession, prior conviction for manslaughter, parole violations; editorials, letters called for defendant's execution). At least one district court in the Ninth Circuit has categorized *Daniels* as an "extreme case likely to invoke strong and lasting impressions" of the defendant because he was "a cop killer, he was hunted by a SWAT team, and one of the men he killed was such an outstanding police officer that his name warranted special public recognition." *United States v. Celestine*, 3:09-CR-00065 JWS, 2009 WL 3676497, at *5 (D. Alaska 2009) (unpublished opinion).

The pretrial publicity at the time of the defendants' first motion, although sustained and unflattering to the defendants, had not made the prosecution into a circus or created a lynch mob mentality. See *Stafford*, 34 F.3d at 1566 (presumed prejudice appropriate only when publicity created circus-like atmosphere, created lynch mob mentality throughout venire). There was no error in Judge Clark's failure to grant the defendants' first

motion for change of venue on a presumed prejudice basis.

Second Motion for Change of Venue

Our evaluation of presumed prejudice from the vantage point of the second motion for change of venue—considered by Judge Clark in early August 2002 after several television stations aired the Kline ad and secondary coverage of the controversy it generated—changes little. We need only reexamine the second and fourth *Skilling* factors, the magnitude and tone of coverage and the timing of the crime and trial.

We acknowledge that these two factors were affected by the advertisement and resulting coverage, but, we think, only marginally. Although responsible press outlets had refrained from referring to either of the defendants as a murderer before the ad ran, we are confident that the ad's photograph and reference to R. Carr by name as the murderer of the quadruple homicide victims would have been recognized by the vast majority of potential jurors as the overheated campaign pitch it was. There was minimal danger of it being regarded as reliable journalism. As counsel for R. Carr asserted during the hearing on the second motion, the ad was a poor excuse for political speech; but reasonably discerning potential jurors would have recognized that as well.

On the fourth *Skilling* factor, the timing of the crime and trial did not change. However, the ad and stories about its effect on the case and on the primary race fell 2 months closer to the beginning of jury selection than the hearing on the first motion. Although they may have ratcheted up public

anticipation of the trial somewhat sooner than could have been expected in the ordinary course, eventually the ordinary course was bound to be followed. Again, sensational crimes inevitably produce at least some breathless press, but the amount attributable to the Kline ad and its secondary coverage was negligible in the grand scheme before us.

There was no presumed prejudice for Judge Clark to recognize by granting the defendants' second motion for change of venue.

Third Motion for Change of Venue

The defendants' third motion came after the completion of jury selection. In the defendants' view, the process of general and individual voir dire, the strikes for cause and the peremptory strikes, although executed in an orderly fashion, had confirmed their worst fears. They contended they were in the center ring at the circus, where a fair trial would be impossible.

This is the essence of the doctrine of presumed prejudice. If it exists, then, by definition, the problem of damning pretrial publicity and the public opinions on guilt it has spawned are not amenable to correction. No amount of juror education or admonition or instruction will fix them. No number of seemingly sincere assurances by a venire member that he or she can and will put aside preconceived ideas about the defendants' culpability can be believed.

We simply cannot go there. When we reexamine the seven *Skilling* factors as of the time of the defendants' third motion, again, we do not believe that Judge Clark erred because prejudice should have been presumed.

The press still was not running amok in the courtroom. Judge Clark maintained appropriate control. Although the jury questionnaire responses and the content of individual voir dire confirmed Dahl's earlier surveys showing that familiarity with pretrial publicity was wide and deep, defendants did not even claim that the tone of the coverage had altered in any significant way to their detriment. The other *Skilling* factors, on the record before us, also were static or remained inapplicable. The defendants and their counsel did not show that "an irrepressibly hostile attitude pervaded the community," *Stafford*, 34 F.3d at 1566, requiring Judge Clark to transfer the case to a different county.

Even now, with the benefit of the full record of the trial, including the verdict, we cannot say that prejudice should be presumed. In *Skilling*, the Court observed that the jury's acquittal of the defendant on several insider-trading charges was of "prime significance," weighing heavily against such prejudice. 561 U.S. at 383. Here, the jury acquitted R. Carr's codefendant, J. Carr, of all charges stemming from the Schreiber incident despite media coverage connecting both defendants to all three incidents. "It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption." *Skilling*, 561 U.S. at 383-84 (citing *United States v. Arzola-Amaya*, 867 F.2d 1504, 1514 [5th Cir. 1989]). We agree.

Actual Prejudice

We now turn to actual prejudice, also a constitutional concern under the Sixth and Fourteenth Amendments and § 10 of the Kansas Constitution Bill of Rights.

"In reviewing for actual prejudice, we examine whether the judge had a reasonable basis for concluding that the jurors selected could be impartial.'" *McVeigh*, 153 F.3d 1166, 1183 (10th Cir. 1998) (quoting *United States v. Abello-Silva*, 948 F.2d 1168, 1177-78) (10th Cir. 1991). The crucible for determination of actual prejudice is voir dire. *Foley v. Parker*, 488 F.3d 377, 387 (6th Cir. 2007) "The court must review the media coverage and the substance of the jurors' statements at voir dire to determine whether a community-wide sentiment exists against the defendant." 488 F.3d at 387.

The appellate standard of review of a district judge's decision on actual prejudice is abuse of discretion. Jury selection is a task "particularly within the province of the trial judge." *Ristaino v. Ross*, 424 U.S. 589, 594-595, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976). Thus, when a district judge rules that a juror can set aside pretrial publicity and decide the case on the evidence, his or her ruling is entitled to special deference:

> "Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges.
>
> "Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. [Citation omitted.] In

> contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service. We consider the adequacy of jury selection therefore, attentive to the respect due to district-court determinations of juror impartiality and of the measures necessary to ensure that impartiality." *Skilling*, 561 U.S. at 386-87.

"Negative media coverage by itself is insufficient to establish actual prejudice." *Foley*, 488 F.3d at 387. And the fact that jurors entered the box with preconceived opinions of guilt alone does not overcome a presumption of juror impartiality. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). "The relevant question is not whether the community remembered the case, but whether the jurors at trial had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); *Goss v. Nelson*, 439 F.3d 621, 627 (10th Cir. 2006) (defendant's right to impartial tribunal satisfied when jurors can base decision on evidence).

In this case, although Judge Clark was brief in his ruling on the defendants' third motion for change of venue, advanced at the conclusion of jury selection, his statement referenced his assessment that, despite widespread pretrial publicity, an unbiased jury had been selected in Wichita. Eight of the 12 jurors

eventually seated in the defendants' trial held no prior opinions on guilt. The four who admitted to forming such opinions ultimately said that they could set their opinions aside. See *Hale v. Gibson*, 227 F.3d 1298, 1320 (10th Cir. 2000) (defendants must show more than juror's preconceived notion; defendant must show juror's notion fixed). On their face, these voir dire responses provided Judge Clark with a reasonable basis for his ruling. See *Gardner v. Galetka*, 568 F.3d 862, 890 (10th Cir. 2009) (no actual prejudice despite 55 percent of prospective jurors with previous opinion on guilt, including four of 12 seated; court spent 5 days examining prospective jurors about knowledge of facts, ability to set aside opinions of guilt).

The defendants argue, nevertheless, that neither Judge Clark nor we can rely on the jurors' declarations of impartiality, and there is some authority for setting aside juror declarations of impartiality in extreme cases.

In *Irvin*, the United States Supreme Court recognized that adverse pretrial publicity can create so much prejudice in a community that juror declarations of impartiality cannot be credited. *Irvin* involved a situation in which headlines before defendant Leslie Irvin's trial "announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess." 366 U.S. at 725. On the day immediately before trial began, newspapers carried a story "that Irvin had orally admitted the murder of (the victim in this case) as well as 'the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in

Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky.'" 366 U.S. at 726. The press also reported that Irvin had offered to plead guilty in exchange for a sentence other than death. In addition, the record in *Irvin* evidenced difficulty in impaneling his jury. The court was forced to excuse 268 of 430 potential jurors because they expressed immovable opinions on Irvin's guilt. 366 U.S. at 727. Of the jurors ultimately seated, eight of 12 had admitted to possessing some preconceived opinion on his guilt. Under these circumstances, the Court held that the trial judge erred in accepting the jurors' representations about their ability to be impartial:

> "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. [Citation omitted.] Where one's life is at stake—and accounting for the frailties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he 'could not give the defendant the benefit of the doubt that he is innocent.' Another stated that he had a 'somewhat' certain fixed opinion as to petitioner's guilt. No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact

> requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.' With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." 366 U.S. 727-28.

Since *Irvin*, the Supreme Court has twice considered whether a juror's declaration of impartiality should be discounted.

In *Patton v. Yount*, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984), the jury convicted defendant Jon E. Yount of first-degree premeditated murder and rape of one of his female students. On direct appeal, the state court reversed Yount's conviction and remanded for a new trial. He was again convicted after retrial, and he claimed that pretrial publicity deprived him of his right to trial by a fair and impartial jury. The publicity leading up to his second trial disclosed the result of his first trial, his confession, and his earlier plea of temporary insanity—all information not admitted into evidence at the second trial. Voir dire demonstrated that all but 2 of 163 veniremen had heard of the case, and that 126 of the 163 would carry an opinion of guilt into the jury box. 467 U.S. at 1029. Eight of the 14 seated jurors and alternates admitted that they had formed an opinion of guilt. 467 U.S. at 1029-30. Nevertheless, the Court distinguished *Irvin*

and affirmed Yount's conviction, because jurors' opinions of guilt had weakened considerably in the 4 years that passed between the first trial and the second. "Many veniremen, of course, simply had let the details of the case slip from their minds," the Court said. 467 U.S. at 1033. For others, "time had weakened or eliminated any conviction they had had ." Ultimately, "the voir dire resulted in selecting those who had forgotten or would need to be persuaded again." 467 U.S. at 1033-34.

Likewise, in *Murphy v. Florida*, 421 U.S. 794, 800-01, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), the Supreme Court refused to set aside juror declarations of impartiality when voir dire responses did not reflect the wave of community hostility present in *Irvin*.

Relying on this authority, the Tenth Circuit also has refused to set aside juror declarations of impartiality. In *Hale v. Gibson*, 227 F.3d 1298, 1333 (10th Cir. 2000), 6 of 12 jurors seated had held some opinion of the defendant's guilt. 227 F.3d at 1333. But all confirmed their ability to be fair and impartial in response to inquiry from the trial court. 227 F.3d at 1332. The panel distinguished *Irvin*, observing that voir dire did not uncover "an atmosphere of hostility toward the defendant, nor did the trial court have a difficult time in seating the jury." 227 F.3d at 1333.

The Tenth Circuit reached the same result in *Gardner*, where 4 of 12 jurors had earlier formed an opinion of guilt. 568 F.3d at 887-90. The panel again distinguished *Irvin*, in part because protective measures taken by the trial court judge during jury selection bolstered the credibility of juror declarations of impartiality. *Gardner*, 568 F.3d at 889-90.

We are satisfied that this case is not as extreme as *Irvin*, and we decline the defendants' invitation to second-guess jurors' assurances that they could disregard pretrial publicity and their previous impressions. As discussed in relation to presumed prejudice, there was no smoking-gun reporting in this case. The jury pool here was far less polluted by preconceptions on guilt; in *Irvin*, 90 percent of potential jurors believed the defendant was guilty. Here, Judge Clark was not forced to excuse 60 percent of the jury pool at the outset. The number of jurors ultimately seated who had to set aside their earlier opinions was half of that who would have had to do so in *Irvin*; and none of them expressed community outrage. We also are reassured here by the protective measures taken by Judge Clark, including use of jury questionnaires and individual voir dire.

We do find it necessary to express a word of caution on the conduct of sound voir dire before leaving the subject of actual prejudice. Our review of the individual voir dire in this case reveals several instances when Judge Clark appeared to have taken it upon himself to rehabilitate a venire panel member. This effort typically took the form of summarizing the panel member's previous responses to questions in a way that would minimize evidence of bias and then asking for confirmation. In addition, the questioning prosecutor used leading questions on several occasions to induce panel members to voice their ability to be impartial. These behaviors by a judge or a prosecutor cloud appellate evaluation of the record on the actual prejudice, particularly the difficulty of finding unbiased jurors, because we must be mindful of the unintended influence a trial judge and a lawyer for the State may

have over lay jurors intimidated by the possibility of participation in deciding a difficult case in an unfamiliar environment. See *Skilling*, 561 U.S. at 455-56 (Sotomayor, J., concurring and dissenting) (criticizing trial judge for addressing topics of juror bias in cursory fashion, failing to use probing, open-ended questions about jurors' opinions, beliefs).

We urge our district judges and all counsel to refrain from suggesting panel member answers that will defeat challenges for cause. Avoidance of these sorts of interactions is necessary to merit the deference inherent in our abuse of discretion review of a judge's ultimate decision on actual prejudice. See *Skilling*, 561 U.S. at 447 (Sotomayor, J., concurring and dissenting) ("In particular, reviewing courts are well qualified to inquire into whether a trial court implemented procedures adequate to keep community prejudices from infecting the jury. If the jury selection process does not befit the circumstances of the case, the trial court's rulings on impartiality are necessarily called into doubt.").

Statutory Claims

We have previously interpreted our state venue change statute to say that the "burden is on the defendant to show prejudice exists in the community, not as a matter of speculation, but as a demonstrable reality." *State v. Anthony*, 257 Kan. 1003, 1013, 898 P.2d 1109 (1995).

The first statutory claim by the defense is that we have interpreted and applied K.S.A. 22-2616(1) in an unconstitutional manner. The second is that Judge Clark abused his discretion in denying the defendants'

repeated K.S.A. 22-2616(1) motions for change of venue.

On the constitutional challenge to our interpretation and application of the statute, J. Carr has relied on language from *Sheppard*: "[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom. But *where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial,* the judge should transfer it to another county not so permeated with publicity." *Sheppard v. Maxwell*, 384 U.S. 333, 362-63, 86 S. Ct. 1507, 16 L. Ed. 600 (1966). He argues that this language establishes a standard of proof of "reasonable likelihood" of unfair trial under the Sixth Amendment. In contrast, he asserts, Kansas courts have elevated the statutory standard of proof from "reasonable likelihood" to "absolute certainty."

We disagree. The standard of proof in our precedent is "reasonable certainty" that the defendant cannot obtain a fair trial in the ordinary venue. *Anthony*, 257 Kan. at 1013; see *State v. Lumbrera*, 252 Kan. 54, 57, 845 P.2d 609 (1992); *State v. Ruebke*, 240 Kan. 493, 499, 731 P.2d 842 (1987).. This is wholly consistent with that part of federal constitutional law on which J. Carr focuses. See *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980) (Supreme Court decisions create standard by which Sixth Amendment compels change of venue when party "adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community"); *Williams v. Vasquez*, 817 F Supp. 1443, 1473 (E.D. Cal. 1993), *aff'd.*

Williams v. Calderon, 52 F.3d 1465 (9th Cir. 1995) (Sixth Amendment due process considerations require change of venue if trial court is "unable to seat an impartial jury because of pretrial publicity"); *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (venue change warranted only upon showing by defendant that widespread, pervasive pretrial publicity saturates community, "reasonable certainty that such prejudice will prevent him from obtaining a fair trial by an impartial jury"); see also Fed. R. Crim. P. 21(a) ("[T]he court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."); 33 A.L.R.3d 17, § 3(a) (numerous federal, state courts hold change of venue required only when "the prospects of the defendant not receiving a fair and impartial trial are "reasonably certain," or "likely").

Moving to the abuse of discretion claim, we have established a pattern of evaluating whether the level of prejudice warrants a venue change under the statute by examining nine factors. *State v. McBroom*, 299 Kan. __, ___, 325 P.3d 1174 (2014) (slip op. at 25). Several of the factors are similar to those set out in *Skilling* for presumed prejudice analysis. We review:

> "[1] the particular degree to which the publicity circulated throughout the community; [2] the degree to which the publicity or that of a like nature circulated to other areas to which venue could be changed; [3] the length of time which elapsed from the dissemination of the publicity to the date of trial; [4] the care exercised and the

> ease encountered in the selection of the jury; [5] the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; [6] the challenges exercised by the defendant in the selection of the jury, both peremptory and for cause; [7] the connection of government officials with the release of the publicity; [8] the severity of the offense charged; and [9] the particular size of the area from which the venire is drawn." *State v. Higgenbotham*, 271 Kan. 582, 592, 23 P.3d 874 (2001) (citing *State v. Jackson*, 262 Kan. 119, 129, 936 P.2d 761 [1997]).

This court originally adopted these factors from an A.L.R. report published in 1970, which examined pretrial publicity as grounds for a venue change. See *State v. Ruebke*, 240 Kan. at 499-500 (citing 33 A.L.R.3d 17, § 2[a]). It has continued to employ them as recently as a few weeks ago. See *McBroom*, 299 Kan. at __ (slip op. at 25).

On the record before us, the first, second, fifth, and eighth factors favored transfer of venue out of Sedgwick County.

On the first factor, Dahl's compilation of press and online publications supported the existence of a high degree of negative publicity circulated throughout the community. The July 2002 Kline advertisement and resulting coverage added to it. On the second factor, Dahl's comparative telephone surveys demonstrated that the effects from pretrial publicity about the crimes and this case were considerably less pronounced in Wyandotte County. And the Kansas City version of the Kline ad did not name R. Carr or call him a murderer.

On the fifth factor, Dahl's research also showed that a significant percentage of the Sedgwick County jury pool was affected by what they read and heard about the defendants; and four of the trial jurors admitted that they came to the courtroom with opinions favoring guilt. On the eighth factor, the most serious charged offenses could not have been more severe or their potential consequences more irreversible.

The five other factors enumerated for the first time in *Ruebke* favored denial of the defendants' motions.

On the third factor, 21 months elapsed between the first rush of publicity in the immediate aftermath of the crimes and the defendants' arrests and the beginning of jury selection. Although other spikes in publicity occurred in the interim, it is plain that none ever matched the breadth and intensity of early coverage. On the fourth factor, Judge Clark employed jury questionnaires and individual voir dire, both of which had a natural tendency to encourage candor from prospective jurors asked about sensitive subjects. A preliminarily qualified group of 60 prospective jurors was assembled without the necessity of examination of the nine panels of 20 Judge Clark was prepared to call. On the sixth factor, venire panel members who were unable or unwilling to set aside negative publicity about the defendants or any opinion of guilt such publicity had a role in inducing were excused. On the seventh factor, nothing in the record would support an assertion that representatives of the State had any particular role in publicizing information about the crimes or the case, and the defendants have wisely conceded the point. And, finally, as discussed in relation to the *Skilling* presumed prejudice factors, the

ninth factor of size of the community cut against venue transfer. Wichita exceeds other Kansas cities in population.

Our case precedents also provide useful parallels for this case. See *McBroom*, 299 Kan. at __ (slip op. at 26) (no error to deny venue change despite survey showing 69.3 percent of respondents believed defendant "probably," definitely" guilty); *Higgenbotham*, 271 Kan. at 593-95 (no error to deny motion to change venue despite defendant's venue survey of Harvey county residents showing 95.7 percent of respondents recall case with minimal prompting, 60.6 percent of respondents believed defendant "definitely," "probably" guilty); *Jackson*, 262 Kan. at 129-32 (no error to deny venue change despite defendant's survey confirming 89.7 percent of respondents recalled case, 60 percent had already decided defendant "definitely," "probably" guilty); *State v. Anthony*, 257 Kan. 1003, 1007, 1014-15, 898 P.2d 1109 (1995) (no error to deny motion to change venue despite defendant's public opinion poll of Salina residents showing 97.5 percent had heard of case, 63.8 percent believed evidence strong); *State v. Swafford*, 257 Kan. 1023, 1035-36, 897 P.2d 1027 (1995) (companion case to *Anthony*; same).

The defendants' attempt to distinguish these cases because the defendants were not being tried under threat of the death penalty is undercut by our decision in *State v. Verge*, 272 Kan. 501, 34 P.3d 449 (2001). *Verge* was a death penalty prosecution.

In that case, defendant Robert L. Verge was convicted of one count of capital murder for the premeditated killings of Kyle and Chrystine Moore in Dickinson County. The defense had engaged Litigation

Consultants, Inc., the same firm that prepared the venue survey in this case, to compare potential jurors in Dickinson County to those in Sedgwick County. The results showed 96.7 percent of the Dickinson County respondents could recall the case; 71.7 percent had talked about it; and 64 percent believed Verge was either "definitely" or "probably" guilty. 272 Kan. at 505. These results were similar to those reported in this case—96 percent of Sedgwick County respondents recalled the case and 74 percent held opinions on guilt. In *Verge*, we affirmed the district judge's decision not to transfer venue.

Here, given the mix of evidence on the nine factors we use to apply K.S.A. 22-2616(1) and our consistent caselaw handed down over more than two decades, we cannot say that "no reasonable person" would have agreed with Judge Clark's decisions on the defendants' motions for change of venue. See *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011) ("Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court.").

The defendants' statutory claims are without merit.

2. SEVERANCE

R. Carr challenges the district court's repeated refusals to sever the guilt phase of the defendants' cases, arguing that the error deprived him of his constitutionally protected right to a fair trial.

Additional Factual and Procedural Background

Defendants requested severance of their cases for preliminary hearing. The State opposed severance,

saying there was no reason to think at that point that R. Carr and J. Carr would mount antagonistic defenses and that there were no problems with one of them making an incriminating statement that would affect the other. See *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (codefendant's confession inculpating accused inadmissible against accused; Confrontation Clause requires defendant charged with crime to have opportunity for cross-examination of declarant). Judge Clark V. Owens II, who was handling the defendants' case at the time, denied the severance request at the April 6, 2001, hearing on the motion. He said it was important to consider whether Holly G. would have to testify "twice or once." He also said that analysis of whether the cases should be severed for trial would be "a totally separate issue," inviting the defense to renew its motion before trial if it still believed severance was necessary and differentiating between the ability of a judge presiding over a preliminary hearing to analyze evidence and that of a jury at trial.

R. Carr filed another motion to sever trial on March 22, 2002. In a supplement to his memorandum in support of the motion filed under seal the same day, he outlined the theory of his defense. The State did not get a copy of this supplement, which stated:

> "2. On the evening of December 14, 2000, Reginald Dexter Carr, Jr., and his brother, Jonathan Carr, met at the home of Tronda Adams and Toni Green. Reginald and Jonathan Carr were both traveling in a beige Toyota Camry belonging to Stephanie Donnelly.

"3. After leaving the Green residence together, Reginald Dexter Carr, Jr. and Jonathan Carr traveled to the apartment complex located at 5400 E. 21st Street in Wichita Jonathan Carr dropped off Reginald Dexter Carr, Jr. and left in the beige Toyota. Reginald Dexter Carr, Jr., not wanting to alert Stephanie Donnelly that he had loaned her car to his brother, left in his (Reginald's) white Plymouth Fury Mr. Reginald Dexter Carr, Jr., traveled around the northern part of Wichita and attempted to sell drugs.

"4. Mr. Jonathan Carr met another individual and went to 12727 East Birchwood and committed the crimes more fully set out in the Amended Complaint/Information

"5. Sometime after the commission of the crimes Jonathan Carr located his brother and made arrangements for Reginald Dexter Carr, Jr., to store the property taken from the Birchwood address in Stephanie Donnelly's apartment at 5400 E. 21st Street, Apt. 819. **Prior to the commission of the crimes at the Birchwood address, Reginald Dexter Carr, Jr. had no knowledge of the facts that were about to unfold, nor did he participate in any preparation or plan to effect the same.**.

"8. Reginald Dexter Carr, Jr., submits there is no forensic evidence that links him to the Dodge Dakota pickup truck, no conclusive

forensic evidence that links him to the scene at 12727 Birchwood, no eyewitness accounts that place him at the Birchwood scene or the scene on Greenwich Road where the bodies were discovered.

"9. In contrast, Jonathan Carr is identified by H.G. as being at both the Birchwood address and the scene on Greenwich Road. He is linked to the scene at Birchwood by forensic DNA evidence and implicated by his own statements to Tronda Adams.

"10. Accordingly, . should the Defendants . be tried together, Mr. Reginald Dexter Carr, Jr.'s defense will be antagonist[ic] to any defense propounded by his brother, Jonathan Carr."

At a motions hearing on April 23, 2002, the State requested copies of all documents filed in support of the motion, including the sealed supplement. R. Carr objected to disclosure of the supplement; his counsel said he would rather withdraw it than prematurely disclose his theory of defense to the State, even if nondisclosure meant he was left without a factual basis to support the motion to sever. The district judge ultimately ruled that the defense did not have to disclose the supplement, but he did not consider it in support of the motion.

During argument on the motion, R. Carr's counsel observed that the failure to sever created a *Bruton* issue because Tronda Adams would testify regarding statements J. Carr made to her about R. Carr. Counsel further argued, without discussing particulars, that the

defendants would advance antagonistic defenses. J. Carr's counsel, Ronald Evans, confirmed that his client's defense would be antagonistic to R. Carr:

> "Judge, there is no way if this case proceeds the way it is now with these brothers being tried together that I cannot prosecute Reginald Carr. That's true in the first stage, but it's absolutely true in the second stage .
>
> ". I have to be Reginald's prosecutor. That adds another prosecutor in the room. There is no way that doesn't prejudice Reginald.
>
> " We're going to get into things on Reginald that there's no way the State would get to introduce into evidence against him if he was sitting there by himself."

The prosecutor recognized the danger for prejudice in a joint trial and suggested that two juries could be impaneled.

Regarding Adams' testimony specifically, the State said that it could easily avoid eliciting objectionable testimony from her. But counsel for J. Carr argued that he would nevertheless need to elicit the objectionable testimony from Adams in furtherance of his client's defense.

The prosecutor then elaborated on the two-jury suggestion, stating that one jury could be removed from the courtroom for testimony that might be prejudicial to the defendant it was assigned, and then, if the defendants were found guilty of at least one capital crime, their juries could be separated to hear severed penalty phase trials. She said her proposal would solve

the problem of how much "time and effort that all would have to place in this case and . . . assure that the rights of the victims are protected as well as the rights of the defendant[s]."

R. Carr's counsel opposed the district attorney's proposal. J. Carr's counsel said that he was not opposed to the suggestion, but he would have to see the proposal in writing. He also said that "trying to do two juries is going to be more work than severing the case and just doing two trials."

After a break, the district attorney repeated her proposal but said she was not advocating for severance. "[W]e could adequately, more than adequately, constitutionally protect the rights of the defendants and entitle the State to a fair trial without the necessity for severance," she said.

The district judge denied the severance motion with leave to refile it if the situation warranted, "especially when all the discovery is closed . "

J. Carr filed another motion for severance on July 30, 2002, which R. Carr joined. At an August 9, 2002, pretrial conference, Judge Clark heard argument on the motion. Counsel for J. Carr first outlined J. Carr's theory of defense:

> "Number one, the defendants have an antagonistic defense. Judge, the clearest way I can put Jonathan Carr's defense right now is he denies categorically his participation in the events he's accused of. His defense will be he was in Tronda Adams' house early the morning of December 15th. His big brother Reggie brought items over, cash, a ring, left those items

> with him. He was not told of the crime. He did not participate in the crime. He is prepared to present an alibi to the jury.
>
> "Now, that is as clear as I can make our defense. I can't think of a way to put it that doesn't put the State on notice of where we're going."

Counsel said that he had not been told the details of R. Carr's planned defense, but R. Carr's counsel confirmed his client intended to assert his innocence at trial and to point the finger at J. Carr.

The State argued that the parties had to demonstrate actual prejudice, not mere speculation, to be entitled to severance and demanded both defendants identify specific evidence or make proffers that would demonstrate actual prejudice.

R. Carr cited Adams' testimony about statements made by J. Carr that would prejudice his client. One of the prosecutors acknowledged that this testimony would constitute a problem under *Bruton*, 391 U.S. 123. But she argued the State would not be able to introduce the statements at either a joint or separate trial because, absent a waiver, R. Carr's Fifth Amendment rights would prevent it from doing so. Neither defense counsel responded to this assertion.

J. Carr's counsel said that, in addition to sponsoring Adams' testimony, he had planned to put on evidence of R. Carr's prison record. However, because the court granted R. Carr's motion in limine to exclude evidence of his record, after the State responded to the limine motion by saying it did not intend to introduce R. Carr's criminal history under K.S.A. 60-455, J. Carr

could not do so in the joint trial. J. Carr's counsel also said there would be no way relatives of the brothers could testify in a joint trial about which brother was the leader and which the follower.

Again, Judge Clark refused to sever the proceedings, "for the same reasons stated when it was first raised."

The State filed successful pretrial motions in limine to prevent defendants from introducing out-of-court statements made by either one of them unless a hearsay exception applied. The State also moved successfully to prevent defendants from introducing evidence of any third party's guilt for the crimes charged as a result of the Birchwood incident, arguing that Kansas' third-party evidence rule prohibited a defendant from introducing circumstantial evidence of another's guilt when the State's case against the defendant was based on direct evidence. The flaws in these rulings are fully discussed in Section 18 of this opinion.

At trial, J. Carr's defense was simply to hold the State to its burden of proof and to argue that any crimes proven were committed under the control and influence of his brother, R. Carr. J. Carr did not advance an alibi theory on any of the three incidents that formed the basis of the charges.

On the other hand, R. Carr sought to defend on the basis that his brother had committed the Birchwood crimes with someone else.

During opening statements, R. Carr began his attack on J. Carr. His counsel conceded that R. Carr was guilty of possessing stolen property from the

Birchwood home and victims, but he said the evidence would show R. Carr was not guilty of the many Birchwood crimes charged. Instead, he asserted, J. Carr and an unidentified, uncharged black male were present at the Birchwood home while R. Carr was not. R. Carr "spent the late night hours of the 14th and the early morning hours of the 15th of December selling drugs in Wichita." Counsel continued:

> "He was not with his brother until sometime in the neighborhood of 5:00 or 5:30. He, Reginald Carr, learned that Jonathan Carr was located near Tronda Adams' house, he went there to help his brother, who was in trouble. While there he saw the Dodge Dakota truck, filled with items that had been stolen.
>
> "In an attempt to help his brother, Reginald Carr took those items—he didn't get into the Dodge Dakota truck, the evidence will be that he's never been inside the Dodge Dakota truck. The Dodge Dakota truck was driven to Stephanie Donley's apartment complex, not by Reginald, not by Jonathan, but by a third black male."

J. Carr's counsel objected to this as "argumentative, unsupported by the evidence," but Judge Clark overruled the objection.

Later that day, during a break in testimony, J. Carr's counsel moved for a mistrial, arguing that the "opening statements illustrate an argument that we've made many times early on in this case as to why we needed to be severed from this matter and have a

separate trial from Reginald Carr," and again moved for severance.

Judge Clark overruled the motion for mistrial and did not separately address the renewed motion for severance.

Each defendant continued to push for severance when evidence that pointed to the other defendant was admitted. J. Carr renewed the motion when the State moved the admission of photographs of the victims' property found in R. Carr's possession, including photographs of Schreiber's watch, Brad H.'s wallet, and Aaron S.'s television. J. Carr also renewed the severance motion when the State admitted evidence of R. Carr's Buffalino boots, a wallet containing R. Carr's birth certificate, and a witness statement law enforcement completed while interviewing Walenta's husband. J. Carr renewed the motion again when he believed R. Carr opened the door for the State to introduce autopsy photographs of Heather M. R. Carr renewed the severance motion when a State expert witness testified to a DNA match between J. Carr and samples recovered from carpet at the Birchwood home.

Judge Clark rejected all of these renewed motions.

J. Carr also renewed the severance motion when the State's witness discussed procedures for handling consumable DNA samples associated with R. Carr, and again when the State moved to admit the engagement ring recovered from J. Carr. Again, Judge Clark rejected the idea of severance.

During the State's case, J. Carr contributed to the evidence tending to prove R. Carr's guilt. During his cross-examination of Officer James Espinoza, for

example, J. Carr focused the jury's attention on property from the Birchwood residence found in R. Carr's possession. During cross-examination of Schreiber, J. Carr emphasized that Schreiber could identify only R. Carr as one of the men who kidnapped and robbed him.

> "Q. But one thing you are certain of, Mr. Schreiber, let me get this clear. You've been certain about this over the last 20 months is Reginald Carr was the driver, is that correct?
>
> "A. Yes.
>
> "[J. Carr's Counsel:] Q. Okay. No further questions. Thank you very much."

Before Adams took the stand, J. Carr's counsel reminded Judge Clark out of the hearing of the jury that R. Carr filed a motion in limine pretrial to exclude certain testimony about him from Adams. J. Carr's counsel requested "guidance from the Court" about the permissible scope of his cross-examination of Adams.

One of the prosecutors informed the judge that there were two separate areas on which she had instructed Adams. One had to do with ownership of a weapon given to Adams; J. Carr had mentioned that it belonged to R. Carr. The other area concerned a remark Adams had overheard J. Carr make during a telephone conversation on the morning of December 15: "[W]hat's Smoke got me into now?" "Smoke" was a nickname used by R. Carr. The prosecutor said she planned to put on evidence about the gun and telephone calls but "not the statement[s] that [J. Carr] made that would in any way implicate Reginald Carr."

Judge Clark said that evidence from Adams on J. Carr's statements about R. Carr remained inadmissible.

J. Carr's counsel made a proffer of Adams' excluded testimony by examining her outside the presence of the jury. Adams said J. Carr initially provided her with a silver gun. When J. Carr came to her home on December 11, 2000, he had a black gun, gave it to Adams, and took back the silver gun. He told Adams that the black gun belonged to "Smoke" and the silver gun belonged to him. On December 13, 2000, Adams said J. Carr came over and took the black gun back. Adams also said that she overheard J. Carr say while on the telephone early on December 15: "[W]hat has Smoke got me into?"

J. Carr's counsel renewed the severance motion again when Judge Clark ordered R. Carr to wear leg and hand restraints in the courtroom during the guilt phase of the trial. That morning, R. Carr had refused to come to trial. And the Sheriff's Department reported that he was making threats to sheriff's officers. J. Carr's counsel argued that R. Carr's misconduct would prejudice his client. He said that Judge Clark was "probably tired of hearing it, but Reginald Carr continues to infect our right to a fair trial."

One of the prosecutors then brought up examples of bad behavior by R. Carr in the courtroom the day before, "one of which was when [R. Carr's counsel] got up to look at a video, the defendant, Reginald Carr, took his chair, pushed [his counsel's] chair by the court guards, physically moved his chair knee-to-knee contact with me in the courtroom." This required court guards "to get up and move him," she said.

Judge Clark said he had seen R. Carr do nothing in the courtroom "that seems disruptive to the process." But he ordered the leg and hand restraints as security measures, making provision to shield them from the view of the jury. He again made no ruling on the renewed motion for severance.

Later that afternoon, Donley took the stand. During R. Carr's cross-examination, counsel attempted to elicit statements R. Carr had made to her about J. Carr the morning of December 15, 2000. J. Carr's counsel objected on hearsay and *Bruton* grounds and renewed his motion for severance. Judge Clark sustained the objections, instructed R. Carr's counsel to avoid the line of questioning, but overruled the motion.

The defendants again argued unsuccessfully that Judge Clark should have severed their prosecutions when they moved for judgment of acquittal at the close of the State's evidence. They did so again, unsuccessfully, at the close of all evidence admitted in the guilt phase.

J. Carr's counsel devoted a significant portion of his closing argument on the evidence supporting R. Carr's guilt. He reminded the jury that Schreiber identified only R. Carr and that Schreiber's watch was found in R. Carr's possession. With regard to the Walenta murder, J. Carr defended the reliability of Walenta's photo array identification of R. Carr.

Earlier in trial, when J. Carr had cross-examined the coroner on the Birchwood crimes, he attempted to establish that only one man fired the shots that killed the Birchwood victims.

> "Q. Based on this, in your opinion, would it not be consistent with one shooter moving down the line shooting Heather and shooting Aaron, then shooting Brad and finally shooting Jason?
>
> "A. I can't comment on that. I can only tell you about the injuries that I found at autopsy."

J. Carr's counsel argued during closing that there was only one gun and one shooter:

> "And that evidence shows who shot and killed four individuals. That person is Reginald Carr with that .380 black Lorcin handgun. Reginald Carr was not alone. But the evidence will show who was playing the lead role that night directing things, taking most of the things. That person again was Reginald Carr."

He also reinforced the reliability of Holly G.'s in-court identification of R. Carr:

> "[Holly G.]'s eyewitness identification of Reginald Carr is consistent and it's solid. If you go chronologically through the order in which she talks to law enforcement, you will see the same description over and over again."

And he attempted to explain Holly G.'s failure to identify R. Carr at preliminary hearing:

> "Now, at the preliminary hearing she identified Jonathan as the person she picked out of the photo array, not Reginald. But we know Reginald shaved his head and was wearing eyeglasses at the preliminary hearing. And at

> the time of trial she makes that correction[] and makes the identification."

J. Carr's counsel also argued that the property found in R. Carr's possession and law enforcement's stop of his Plymouth near the Birchwood residence corroborated other evidence of R. Carr's involvement in the Birchwood crimes. He then highlighted the State's DNA evidence, cigar ash evidence, and Holly G's contraction of HPV.

J. Carr's counsel also argued that the black handgun connected to all three incidents belonged to R. Carr.

At the conclusion of his argument, counsel for J. Carr admitted to J. Carr's involvement in some of the charged crimes, but he placed the bulk of moral responsibility on his codefendant brother:

> "Please remember that some of these crimes do remain unproven as to Jonathan Carr's guilt. Some of them he is actually innocent of. Now, just because the codefendant Reggie is guilty of all of the charges, just because the evidence shows regarding Jonathan some involvement on some of the counts, don't go back there and just check the box guilty all of the above. Please give Jonathan separate consideration on each count. Please consider his guilt or innocence separate from damning evidence against his brother Reginald. It shouldn't be guilt by association. It should be guilt beyond a reasonable doubt. Remember the testimony and our sole admitted exhibit showed Jonathan was supposed to be on a train to Cleveland from Newton in the early

> morning hours of the 15th of December. A train that would have taken him back to his family and friends, but a train he never made because of Reggie."

Standard of Review and Legal Framework

The decision whether to sever a trial is one within the trial court's discretion. *State v. Reid*, 286 Kan. 494, 519, 186 P.3d 713 (2008) (citing *State v. White*, 275 Kan. 580, 589, 67 P.3d 138 [2003]).

Judicial discretion is abused if judicial action is arbitrary, fanciful or unreasonable, or based on an error of law or fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

Under Kansas law, "[t]wo or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the crime or crimes." K.S.A. 22-3202(3). However, "[w]hen two or more defendants are jointly charged with any crime, the court may order a separate trial for any one defendant when requested by such defendant or by the prosecuting attorney." K.S.A. 22-3204.

"[S]everance should be granted when it appears necessary to avoid prejudice and ensure a fair trial to each defendant." *State v. Davis*, 277 Kan. 231, 239, 83 P.3d 182 (2004) (citing *State v. Aikins*, 261 Kan. 346, 360, 932 P.2d 408 [1997]); see *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) (district court should grant severance if there is serious risk that joint trial "would compromise a specific trial right of one of the defendants, or prevent

the jury from making a reliable judgment about guilt or innocence"). Although a single trial may serve judicial economy and ensure consistent verdicts, the right of a defendant to a fair trial must be the overriding consideration. *State v. Martin*, 234 Kan. 548, 550, 673 P.2d 104 (1983).

We have employed several factors to determine whether there was sufficient prejudice to mandate severance. *Davis*, 277 Kan. at 240 (quoting *State v. Butler*, 257 Kan. 1043, 1063, 897 P.2d 1007 [1995], *modified on other grounds* 257 Kan. 1110, 916 P.2d 1 [1996]). We consider:

> "'(1) that the defendants have antagonistic defenses; (2) that important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial; (3) that evidence incompetent as to one defendant and introducible against another would work prejudicially to the former with the jury; (4) that the confession by one defendant, if introduced and proved, would be calculated to prejudice the jury against the others; and (5) that one of the defendants who could give evidence for the whole or some of the other defendants would become a competent and compellable witness on the separate trials of such other defendants.'" 277 Kan. at 240 (quoting *Butler*, 257 Kan. at 1063).

The party moving for severance has the burden to demonstrate actual prejudice to the district court judge. *State v. Hunter*, 241 Kan. 629, 633, 740 P.2d 559 (1987). But the United States Supreme Court has said that a trial judge "has a continuing duty at all stages of

the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516, 80 S. Ct. 945, 4 L. Ed. 2d 921 (1960); see *United States v. Peveto*, 881 F.2d 844, 857 (10th Cir. 1989).

On appeal from a denial of severance, the party claiming error has the burden to establish a clear abuse of discretion. *State v. White*, 275 Kan. 580, 589, 67 P.3d 138 (2003). We also have held: "When a decision is made regarding joinder or severance, even if it is determined that there was an abuse of discretion, the defendant has the burden of showing prejudice requiring reversal." *State v. Boyd*, 281 Kan. 70, 80, 127 P.3d 998 (2006) (citing *State v. Crawford*, 255 Kan. 47, 54, 872 P.2d 293 [1994]). But evolving caselaw generally places the burden of demonstrating harmlessness on the party benefitting from the error. See *Ward*, 292 Kan. at 568-69. We apply that general rule in the severance context today.

Evaluation of Factors

In the guilt phase of this trial, there is no question that the defendants had antagonistic defenses, and the State concedes this point.

R. Carr argued that J. Carr committed the Birchwood crimes with another person. J. Carr's counsel emphasized the relative weakness of the evidence against his client in the Schreiber and Walenta incidents and consistently stressed the evidence of R. Carr's guilt in the Birchwood incident. Each defendant did his best to deflect attention from himself on the Birchwood crimes by assisting in the prosecution of the other. R. Carr insisted he was not involved at all until a temporary storage arrangement

was needed for the stolen property, and J. Carr essentially conceded guilt of both defendants but set up R. Carr as the leader, and thus the more culpable, of the pair. See *White*, 275 Kan. at 590 (quoting *State v. Pham*, 234 Kan. 649, 655, 675 P.2d 848 [1984]) (classic example of "intrinsically antagonistic defenses is where both defendants blame each other for the crime while attempting to defend against the State's case"); see also *Zafiro*, 506 U.S. at 539 (interpreting federal rule on severance similar to Kansas statute: "When many defendants are tried together in a complex case and they have markedly different degrees of culpability, . . . risk of prejudice is heightened", citing *Kotteakos v. United States*, 328 U.S. 750, 774-75, 66 S. Ct. 1239, 90 L. Ed. 1557 [1946]).

On the second factor, R. Carr contends that the denial of severance forced exclusion of testimony from Donley that was exculpatory to him but would have violated Jonathan's Sixth Amendment confrontation rights under *Bruton v. United States*, 391 U.S. 123, 137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). See *State v. Rodriquez*, 226 Kan. 558, 561, 601 P.2d 686 (1979) (following *Bruton*).

On the second factor, it is also important for us to consider that each defendant apparently made at least one personally incriminating statement about being the one who fired the shots that killed Heather M., Aaron S., Brad H., and Jason B. Both of these statements were referenced during the penalty phase. Temica, the defendants' sister, testified that R. Carr told her he shot the four friends. One of the prosecutors referenced a similar statement by J. Carr, apparently made to fellow prisoners while he was in jail awaiting trial.

When the State argued to Judge Clark pretrial that an incriminating statement such as these by one defendant that implicated the other—in that instance, J. Carr's "[W]hat's Smoke got me into?" remark within earshot of Adams—would not have been admissible in a separate trial, it was plainly wrong. J. Carr's remark about "Smoke," given the context in which it was uttered, could have come in at a separate trial of R. Carr through J. Carr himself. It also qualified as a declaration against interest under K.S.A. 60-460(j), if it had to be admitted in a separate trial of either defendant through Adams or the person on the other end of J. Carr's telephone call. In the case of each of the defendant's statements about being the Birchwood shooter, no evidence of either statement could be admitted in the guilt phase of a joint trial under *Bruton*, 391 U.S. 123, because one defendant's confession to that act inevitably incriminated the other as the aider and abettor of that act. But each defendant's statement could have been admitted—and undoubtedly both would have been admitted by the State—in that defendant's separate trial. Each statement could have come into evidence through its hearer or as a declaration against interest under K.S.A. 60-460(j) or as a confession under K.S.A. 60-460(f). And R. Carr could have tried to use J. Carr's statement claiming personal responsibility for the shooting in the soccer field to bolster his "J. Carr-plus-third-person" defense.

This evidence that was inadmissible in a joint trial because of *Bruton*, 391 U.S. 123, but that would have been admissible at a separate trial of R. Carr, also includes R. Carr's eventually proffered own testimony about what J. Carr said to him during three telephone

calls and in person on the night of the Birchwood crimes. Judge Clark ruled erroneously, as fully discussed in Section 18 of this opinion, that these portions of R. Carr's proffer must be excluded under Kansas' third-party evidence rule and as hearsay. Had he not made these erroneous rulings, he would have had to consider the effectiveness of severance to enable R. Carr to get his defense before the jury that would determine his guilt alone.

The third factor from our precedent on severance is not applicable. The fourth factor cut in favor of the State because apparent confessions by each defendant could have come in at separate trials, as discussed above. The fifth factor would be inapplicable unless we assume that the State was willing to grant immunity to one brother to force him to testify against the other in the other's separate trial. This seems unlikely to have happened.

We conclude that Judge Clark's repeated refusal to sever the guilt phase of the prosecution against defendants for trial was an abuse of the judge's discretion.

To begin with, two mistakes of law are immediately recognizable. See *Ward*, 292 Kan. at 550 (judge abuses discretion by making mistake of law). Judge Clark failed to do the necessary analysis when he ruled against severance at the pretrial hearing on August 9, 2002, "for the same reasons . . stated when it was first raised." There were three reasons stated when the subject of severance first arose: the absence of antagonistic defenses, the absence of an incriminating statement from either defendant, and the desire to

avoid putting Holly G. through two trials. The first of these reasons no longer applied.

The second mistake was Judge Clark's apparent willingness to follow the State's misstatement of the law during the same pretrial hearing about the continued inadmissibility of Adams' testimony about J. Carr's "[W]hat's Smoke got me into?" statement in separate trials.

Furthermore, we see an abuse of discretion in the dearth of record support for Judge Clark's virtually indistinguishable, nearly completely unexplained rulings over time, even though the conflict between the defendant's theories became more and more clear and the pile of evidence that would be excluded because of the joint trial grew ever taller. Given Judge Clark's continuing duty to carefully consider severance to avoid prejudice to a defendant, and the overriding status of the defendant's right to fair trial, Judge Clark's decisions were progressively unreasonable.

Prejudice

R. Carr urges us to conclude that Judge Clark's abuse of discretion led not just to prejudice but to prejudice requiring reversal.

R. Carr argues that the State's evidence against J. Carr for the Birchwood crimes was strong, far stronger than its evidence against him. The hair root recovered at the Birchwood home, matching semen samples from the victims, and test results confirming that bloodstains on J. Carr's clothing matched or could not exclude victims Heather M. and Holly G. placed J. Carr at the scene as one of the intruders, and J. Carr failed to contest this in any meaningful way. Because

J. Carr, as one of the perpetrators, had to know the identity of the second perpetrator, when J. Carr launched his trial strategy of minimizing his own role in these offenses and emphasizing Reginald's predominant one, a vouching dynamic similar in force to inculpatory accomplice testimony was created, adding credence to the State's case against R. Carr. Meanwhile, *Bruton* combined with Judge Clark's erroneous rulings on the third-party evidence and hearsay to prevent R. Carr from using the State's and his own evidence against J. Carr to even the playing field.

R. Carr suggests that this skewed the appropriate burden of proof and that it means we cannot know whether the jury convicted him based on the State's evidence, Jonathan's vouching, or a combination of the two—rendering the verdict unreliable. See *Zafiro*, 506 U.S. at 543-44 ("Joinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor, in two general ways. First, joinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary. Second, joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant."); *State v. McQueen*, 224 Kan. 420, 425, 582 P.2d 251 (1978) ("[W]hen the evidence is clear and convincing as to one defendant and not so as to the other, failure to sever may well cause prejudice which will result in manifest injustice in violation of constitutional due process."); but see

State v. Holley, 238 Kan. 501, 508, 712 P.2d 1214 (1986) ("claim of disparate evidence justifies severance in only the most extreme cases") (citing *United States v. Bolts*, 558 F.2d 316 [5th Cir. 1977]).

The State's first response is that the strength of its case against R. Carr demonstrates the reliability of the jury's verdict. It is correct that its independent case against R. Carr was overwhelming. See *McQueen*, 224 Kan. at 425 ("When the evidence of participation and identity of those charged is clear and convincing, prejudice from a joint trial may not be great.")

Schreiber, Walenta, and Holly G. all identified R. Carr. Nuclear DNA testing implicated R. Carr as well as J. Carr, specifically blood from R. Carr's shirts and shorts that matched Heather M. and foreign material recovered from Holly G.'s thigh that excluded all known contributors other than him and his brother. DNA from Schreiber's watch was generally consistent with R. Carr's genetic markers. Mitochondrial DNA testing pointed to R. Carr as a possible contributor of one hair collected from the Birchwood home. The State's ballistics expert testified that the black Lorcin was used in all three incidents, and that gun was linked to R. Carr by the eyewitness identifications of him using a similar black gun. Two shoeprints observed at the Birchwood home were consistent with R. Carr's Buffalino boots. Testimony from law enforcement personnel involved in R. Carr's arrest tended to show he attempted to flee by preparing to jump off Donley's balcony, and he gave an alias rather than his correct name. See *State v. Phillips*, 295 Kan. 929, 949, 287 P.3d 245 (2012) (evidence of flight, use of alias is probative of consciousness of guilt); *State v.*

Ross, 280 Kan. 878, 881, 127 P.3d 249, *cert. denied* 548 U.S. 912 (2006) (citing *State v. Walker*, 226 Kan. 20, 21, 595 P.2d 1098 [1979]) (same). R. Carr had genital warts, and Holly G. learned a few months after her sexual assault that she had contracted HPV, the virus that causes genital warts. Investigators collected larger-caliber ashes, consistent with those from a cigar, inside the Birchwood home. No other ashtrays, cigarettes, or other smoking materials were found in the home. When arrested, a partially smoked cigar with a plastic tip and a cigar box lid were recovered from the pockets of the leather coat Holly G. testified that R. Carr wore during the crimes. After R. Carr's arrest, law enforcement recovered numerous pieces of property owned by the Birchwood victims and Schreiber, as well as other highly incriminating evidence such as ATM receipts connected to the Birchwood victims' accounts, from R. Carr's person, from his girlfriend's apartment, and from the area and vehicles around it.

The State's evidence also challenged the credibility of R. Carr's defense, to the extent he was able to advance it.

The State's witnesses placed R. Carr near the scene of the Birchwood crimes shortly after they were reported. Holly G. testified that R. Carr drove Jason B.'s truck when the group traveled to the soccer field shortly after 2 a.m. Both intruders left together in the truck after the shootings. Sergeant John Hoofer testified about seeing a truck similar to Jason B.'s in the vicinity of the Birchwood home shortly after 3 a.m. About an hour later, Hoofer stopped R. Carr in his white Plymouth, after he had twice driven by the

Birchwood home. R. Carr said he was on his way to Donley's apartment. Donley confirmed R. Carr arrived at her apartment about 4:30 a.m.

Our review of the record persuades us that this was far from a case in which the State, by way of a joint trial, set the defendants upon each other and then coasted. Although its path to R. Carr's convictions was made somewhat smoother and straighter by the judge's related guilt phase errors on severance and on third-party evidence and hearsay, the State presented compelling evidence of R. Carr's guilt, all of which would have been admissible in a severed trial. See *State v. Pham*, 234 Kan. 649, 654, 675 P.2d 848 (1984) ("When the evidence of participation and identity of those charged is clear and convincing, prejudice from a joint trial may not be great."; citing *McQueen*, 224 Kan. at 425).

On the record before us, we hold that R. Carr is not entitled to reversal on this issue.

3. JOINDER OF NONCAPITAL COUNTS

R. Carr challenges the joinder for trial of the noncapital and capital charges against him. His November 19, 2001, motion to sever the charges was denied.

Kansas' criminal statute on joinder of charges and defendants provides:

> "Two or more crimes may be charged against a defendant in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors or both, are of the same or

> similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." K.S.A. 22-3202(1).

"Whether a defendant will be tried on all separate charges in a single trial is a matter within the discretion of the trial court, and its decision will not be disturbed on appeal unless there is a clear showing of abuse of discretion." *State v. Bunyard*, 281 Kan. 392, Syl. ¶ 2, 133 P.3d 14 (2006).

R. Carr argues that Judge Clark erred in denying his motion because the noncapital and capital charges in the amended complaint cannot be "of the same or similar character" because they are not subject to the same punishment. He further argues that the error requires reversal because it is possible that the jury considered or relied upon evidence pertaining to the Schreiber and Walenta incidents in deciding to impose a sentence of death, in violation of his rights under the Eighth and Fourteenth Amendments.

The State supports Judge Clark's decision as legally appropriate, contending that similarity of punishment is merely one of several factors the court may consider in deciding whether offenses are "of the same or similar character." It is not, the State asserts, a condition that must be satisfied before a district judge can exercise discretion to consolidate charges for trial. Should we reach a harmlessness inquiry, the State argues that R. Carr suffered no prejudice from any joinder error because the statutory capital sentencing scheme in Kansas combined with the judge's instructions properly limited the evidence the jury could consider on

aggravating circumstances justifying imposition of the death penalty.

We have previously identified factors relevant to determining whether crimes qualify as "of the same or similar character." Offenses that have general similarities, that "require the same mode of trial and the same kind of evidence, and occur in the same jurisdiction" are sufficiently alike to be tried together. See *State v. Crawford*, 255 Kan. 47, 53, 872 P.2d 293 (1994) (citing *State v. Ralls*, 213 Kan. 249, 256-57, 515 P.2d 1205 [1973]). We have also looked to similarity of punishment as another factor to consider. *State v. Barksdale*, 266 Kan. 498, 507, 973 P.2d 165 (1999).

The governing statute does not expressly require that joined offenses share common punishments. *Crawford*, 255 Kan. at 53. And we are loath to add a requirement not set out by the legislature. See *State v. Hendrix*, 289 Kan. 859, 862, 218 P.3d 40 (2009) (when statutory language plain, unambiguous, no need to resort to statutory construction; appellate court merely interprets language as it appears, does not speculate, read into statute language not readily found).

Indeed, the plain language of the statute explicitly provides that offenses with different punishments may be joined for trial. Joinder of offenses, "whether felonies or misdemeanors or both," is permitted under K.S.A. 22-3202(1). And the punishments for felonies and misdemeanors are, without question, widely divergent. Compare K.S.A. 2013 Supp. 21-6804 and 6805 (Sentencing Guidelines Act grids for nondrug, drug felonies) with K.S.A. 2013 Supp. 21-6602 (defining classes of misdemeanors, setting out permissible terms of confinement).

This court embraced such an analysis in *State v. Cromwell*, 253 Kan. 495, 856 P.2d 1299, *holding modified by State v. Willis*, 254 Kan. 119, 864 P.2d 1198 (1993), where we examined whether a district judge abused his discretion by refusing to sever the trial of two sets of charges for rape, robbery, and murder committed on two separate occasions. The defendant argued that a difference in the ages of the two victims, a lapse of 4 years between the two crimes, and the applicability of a hard 40 sentence to one incident but not the other, rendered the sets of charges sufficiently dissimilar to require that they be tried separately. 253 Kan. at 511.

On the subject of punishment similarity, we said:

> "The application of the 'hard 40' sentence to [one murder] but not to the [other murder] is not material. The legislature did not consider differences in sentences to be dispositive because K.S.A. 22-3202(1) speaks of the similarities of the crimes, not the sentences, and contemplates potential trial of felonies and misdemeanors together. Moreover, while the consideration of aggravating factors may distinguish the hard 40 from other sentences, the jury considers whether to impose the hard 40 in a separate proceeding after the guilt phase of the trial is complete. Thus, evidence of and argument about aggravating factors need not taint the guilt phase of the trial." 253 Kan. at 511.

This language from *Cromwell* is on point and persuasive. This court's decision in *State v. Thomas*, 206 Kan. 603, 608, 481 P.2d 964 (1971), cited by R. Carr, is not.

The *Thomas* opinion mentioned the dissimilarity of murder and forgery punishments incidentally in its discussion on whether the crimes could be joined for trial as "of the same or similar character." But a careful review of its language demonstrates that the court's primary focus was a complete lack of relationship between the two crimes and the evidence it would take to prove them:

> "Testing the offenses consolidated here, against the standards referred to, it cannot be said that murder and forgery are of the same general character; nor is the same kind of punishment required. As we have already observed, the murder evidence was totally unrelated to the forgery evidence—the evidence establishing one offense was no proof of any element of the other offense. The murder evidence was largely circumstantial, while that of forgery was documentary and eyewitness testimony. Except for police officers, who investigated aspects of both cases, the witnesses were separate and distinct with respect to each case." 206 Kan. at 608.

This case is different from *Thomas*. The three December 2000 incidents giving rise to the noncapital and capital charges against R. Carr are related in several important ways. The victims of the crimes identified one or both defendants as the perpetrators. There was evidence that each incident had a gun in common. Certain aspects of the perpetrators' modus operandi were consistent, at least between pairs of incidents—*e.g.*, one of the perpetrators held a black gun palm down in both the Schreiber and Walenta

incidents, the victims in both the Schreiber and Birchwood incidents were forced to drive to ATMs and withdraw money from their bank accounts, a light-colored car followed a woman driving home at night in the lead-up to both the Walenta and Birchwood incidents. Belongings of Schreiber and the Birchwood victims were discovered together. All of the incidents occurred within a few days of each other.

These multiple connecting points were more than enough to justify trying all of the charges arising out of the three incidents together. Identity of possible punishment between the noncapital and capital charges was not required under the plain language of the statute or our caselaw applying it. Judge Clark did not abuse his discretion in denying R. Carr's motion to sever the noncapital and capital counts for trial.

4. JURY SELECTION

R. Carr contends that Judge Clark erred in three ways on the parties' challenges for cause: (a) by excusing prospective juror M.W., who opposed the death penalty; (b) by failing to excuse allegedly mitigation-impaired jury panel members W.B., D.R., D.Ge., and H.Gu.; and (c) by excusing prospective jurors K.J., M.G., H.D., C.R., D.H., and M.B., who expressed moral or religious reservations about the death penalty. The State responds that all of these rulings by Judge Clark are supported by the record and that he properly exercised his discretion.

Excuse of M.W. for Cause

Additional Factual and Procedural Background

The defendants attempt to demonstrate that Judge Clark erred in excusing M.W. on the State's challenge for cause, based on M.W.'s death penalty view, by comparing the record of his questionnaire responses and voir dire to those of 11 other prospective jurors whom the defense challenged unsuccessfully. We therefore summarize what we know about M.W. and the 11 panel members to whom the defendants compare him.

M.W.

M.W. said in his responses to the questionnaire that he was morally opposed to the death penalty and could not vote to impose it under any circumstances.

During the State's voir dire, M.W. confirmed that he could never sentence a person to death, even if the court instructed him to do so. M.W. explained that his moral objection was founded on Biblical grounds and that his belief was firmly held and would not change. At times during defense voir dire, however, M.W. vacillated. He declared his ability to impose the death penalty if forced to do so by law and confirmed that his "moral, philosophical, or religious beliefs" would not prevent him "from following the law in this case and doing [his] job as a juror." Still, when counsel for R. Carr asked M.W. if he could sentence defendants to death, "[d]espite what the Bible says," M.W. responded, "The [B]ible comes first."

When the State challenged M.W. for cause because of his conflicting statements, Judge Clark inquired further on M.W.'s death penalty opposition:

> "[W]hat I heard you say is you could do your job every step of the way of being a juror, but the good book comes above all in your mind and it says thou shalt not kill and vengeance belongs to the Lord and you could not cast a vote against the Bible; that is, to impose death on another human being."

M.W. said, "Yes, sir", confirming that Judge Clark had summarized his position accurately, and he was excused.

J.R.

In his questionnaire, J.R. expressed strong support of the death penalty and said he had difficulty understanding how mitigating circumstances could justify a different sentencing outcome.

However, during the State's voir dire, J.R. said he would not support the death penalty in every case without regard to the particular facts. He agreed "absolutely" that the State should be required to prove that there were circumstances sufficient to warrant imposition of capital punishment, and he said he would consider mitigation evidence in this case.

J.R.'s statements during his voir dire by the defense were less than categorical. When asked whether he could truly give fair consideration to mitigating circumstances, J.R. responded, "I believe I could be fair. I will admit that I have a problem—I have a problem with" age as a mitigating circumstance. The defense asked, "Now by being fair, does that mean that if we

get to the second stage is your mind going to already be made up that it's death before we even present any evidence on mitigator[s] or are you going to keep an open mind?" J.R. responded, "I would say I'd have to keep an open mind," and he declared his ability to do so. Later, when defense counsel asked J.R. whether he would be leaning toward a sentence of death if the defendants were convicted of capital murder, J.R. said "[i]t would depend on the evidence." When counsel pushed for a clearer response, J.R. said that he "would probably be leaning toward death."

When the defense challenged J.R. for cause, Judge Clark asked several follow-up questions, some of which were leading. For example, after J.R. expressed some difficulty accepting age as a mitigating factor, Judge Clark inquired, "Even under instruction of law that that's one of the things you have to give consideration to?" J.R. confirmed that he could enter the sentencing phase of this case, if any, with an open mind and could set aside his personal views about the death penalty. The judge rejected the challenge for cause.

D.Gr.

D.Gr. was another prospective juror who favored the death penalty. But he said during voir dire that it would not be difficult for him to set aside his personal view and that he would consider evidence of mitigating circumstances fairly. He expressed his understanding that the law (as of the time of trial in this case, see *State v. Kleypas*, 272 Kan. 894, 1015-19, 40 P.3d 139 [2001], *cert. denied* 537 U.S. 834 [2002], *later overruled by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 [2006]), required him to impose a life sentence if the State failed to prove aggravating

circumstances outweighed mitigating circumstances, and he confirmed that he would follow the law. He agreed further that the death penalty would not be imposed automatically upon conviction for capital murder and that he would be required to consider aggravating and mitigating circumstances to decide the appropriate penalty. Some of D.Gr.'s statements responded to leading questions from the prosecutor, such as "you're not of the frame of mind to just say okay, I've found them guilty of capital murder and it's over and I'm just going to impose the death penalty?"

During R. Carr's questioning, D.Gr. confirmed that in questionnaire responses he said that "the crime was too great, prison is not the answer." When R. Carr's counsel asked, "given the fact that you think the crimes committed were too great and that prison is not the answer, are you not, in fact, predisposed to vote for death if the State proves any of the aggravating circumstances that they've alleged?" D.Gr. responded, "If they're proven, I would have to vote for the death penalty." But, in responding to counsel's follow-up question, D.Gr. agreed that if any mitigator is found to equal the aggravators that he would be required to vote for life. D.Gr. said that his personal opinions would not impair his ability to consider mitigating circumstances as support for a life sentence and that he would consider mitigators even if convinced beyond a reasonable doubt that the crimes were committed in an especially heinous, atrocious, or cruel manner. D.Gr. again confirmed his willingness and ability to give meaningful consideration to mitigation evidence in response to questions from J. Carr's counsel. The judge rejected the defense challenge for cause.

D.Ge.

In questionnaire responses, D.Ge expressed strong support for the death penalty but also said that he neither favored nor opposed the penalty as a punishment; instead, he said, he would base his decision on the facts and law.

During the State's voir dire, D.Ge. confirmed his understanding that a juror cannot impose the death penalty automatically upon conviction. D.Ge. also declared that he would apply the law and could impose a life sentence if the evidence and law supported that outcome. Several of D.Ge's statements responded to leading questions from the prosecution, including the following exchange:

> "[PROSECUTION]: Now, you understand now that just because they're found guilty of the most severe crime doesn't mean that they're automatically given the death penalty. You agree with that now?
>
> "[D.GE]: Yes, I agree with that."

During questioning from R. Carr's counsel, D.Ge. confirmed that he could not impose a sentence of death if the State failed to carry its burden to prove aggravating circumstances outweighed mitigating circumstances. He strongly supported the death penalty in cases of multiple murders and when a murder was committed in an especially cruel and heinous way. In such situations, he was unsure whether any mitigation could warrant a sentence other than death. D.Ge. confirmed, however, that he would first get the facts from both sides and weigh the evidence before arriving at his sentencing decision and

that his personal beliefs would not interfere with his ability to do so.

S.T.

The defense challenged S.T. for cause because they believed her questionnaire responses demonstrated that she would automatically impose the death penalty. But S.T. said during voir dire that, when she answered the questionnaire, she was under the impression that the judge would impose the death penalty if the defendants were found guilty of capital murder; she was not aware of the jury's role in sentencing. Once the process was explained, S.T. said she would not impose the death penalty automatically in the event the defendants were convicted. She confirmed her willingness to consider the defendants' mitigation case fairly and to impose a life sentence if the State failed to prove that aggravating circumstances outweighed mitigating circumstances, and the judge rejected the challenge for cause.

R.P.

R.P. said that he would "go with the death penalty" if the defendants were found guilty beyond a reasonable doubt. On voir dire, R.P. explained, "[W]ell, heck, I just can't really consider after what has happened here or in any murder when somebody takes a human life why you wouldn't be in favor of [the death penalty]," and he expressed doubt whether mitigating circumstances could excuse the conduct alleged in this case. But R.P. also said that he would enter the sentencing phase with an open mind and that he would base his sentencing decision on the facts and law. He also said repeatedly during voir dire that he was

committed to following the law, and his questionnaire responses indicated he was willing to consider sentences other than death if various mitigating circumstances were presented. He did not believe that his personal views substantially impaired his ability to serve as a juror.

Counsel for J. Carr asked R.P. whether, given his personal views, he would be coming in to the sentencing phase leaning toward death if the jury had just convicted the defendants of killing five people. R.P. responded, "No, it's not—no I haven't. I haven't decided yet." Counsel continued to press the issue: "At that stage—before you heard any of the aggravators or mitigators, are you leaning one way or another of life or death after having been convicted of capital murder?" R.P. said, "No, I haven't really even considered it one way or the other yet. I'm just going to have to do it all when we get all the evidence."

When counsel for J. Carr challenged R.P. for cause, counsel appeared to recognize that, once the parties had explained the jury's role in the sentencing phase, R.P had clarified his willingness to consider and impose a sentence other than death.

Judge Clark responded to the challenge by asking R.P.:

> "Mr. [P.], what I've heard you saying on those aggravators and mitigators—especially on [J. Carr's counsel's] questions—is if the State failed to prove, and you were saying not guilty, but if they failed to prove any aggravating circumstances or if the mitigating circumstances that the defendants put forward outweighed

those aggravators, then you'd vote for life. Isn't that what you said?"

R.P. replied, "Yes, sir."

This apparently satisfied the judge that R.P. would be willing to consider evidence supporting aggravating and mitigating circumstances and would sentence to life imprisonment if the State failed to carry its burden of proof. The judge rejected the defense challenge for cause.

B.Mc.

Counsel for R. Carr asked B.Mc. whether there was "any verdict other than death that is appropriate if an accused is convicted of capital murder." She responded: "If that's the only evidence that was presented and they were convicted of capital murder, no, it would be the death penalty, if that was the only evidence and that's the only decision that was made." Counsel then asked about aggravating and mitigating circumstances, and B.Mc. expressed her willingness to give fair consideration to mitigation evidence. She also said that, even if the State proved the crimes were committed in an especially heinous, atrocious, or cruel manner, she would "have to really consider" a defendant's lack of criminal history as a mitigating circumstance. B.Mc. said that, even though she personally supported the death penalty, she would set that aside, listen to all of the evidence, and weigh it in a manner consistent with the law as instructed.

R. Carr's counsel explained the state of the law on weighing of aggravating and mitigating circumstances, telling B.Mc. that, if the State failed to prove aggravators outweighed mitigators, then the jury

would be obligated to impose a sentence of life imprisonment. Asked if she was comfortable with that concept, B.Mc. said, "Yes. I would obey the law in whatever was set before me." In response to questions from J. Carr's counsel, B.Mc. agreed that her personal belief in capital punishment would not "substantially impair [her] ability to consider evidence in mitigation."

Judge Clark rejected the defense challenge to B.Mc. for cause, saying, "I hear her saying she'll consider all the factors present and make a decision based on the evidence and the law."

S.W.

S.W. responded to the questionnaire in a way that suggested he would vote to impose the death penalty automatically. But, like S.T., S.W. explained that he had completed the questionnaire without a full understanding of the capital sentencing process. Once Judge Clark and the parties explained the process, S.W. said it became clear that defendants are not to be sentenced to death automatically at the time of conviction, and he said he was committed to follow the law. Judge Clark rejected the defense challenge.

M.P.

M.P. was a criminal defense lawyer in private practice in Sedgwick County at the time of the trial. In his questionnaire and during the State's voir dire, M.P. expressed his support for the death penalty but said he would not impose such a sentence automatically upon conviction. M.P. agreed to apply the law as instructed, not as he interpreted it or believed it should be. He also expressed his willingness to consider all mitigating

evidence in the event of a sentencing phase. Judge Clark rejected the defense challenge.

K.M.

K.M. favored the death penalty but said she would decide the appropriate sentence based on the facts and the law. And, after the State explained the statutory weighing of aggravators and mitigators, K.M. declared her willingness and ability to vote for a life sentence. She expressed far greater concern about her ability to live with a decision to end another person's life. She also said that she would consider mitigating circumstances, but she did not know how much weight she could give them.

Judge Clark made further inquiry.

> "I think the last question, Miss [M], was whether or not you think that everything you've stated here, and maybe it's been yes or no to long questions, based on everything you've heard do you think your ability would be substantially impaired to give consideration to mitigating circumstances should you be selected to serve should the case reach that far?"

K.M. responded, "No." The judge rejected the defense challenge.

T.F.

T.F. said he personally believed that the death penalty was the only punishment appropriate for taking another person's life. However, after the judge and the prosecution elaborated on the duties and obligations of a juror in a capital trial, T.F. said he

could set his opinion aside and give fair consideration to all of the evidence. He said he would not be leaning toward death in the event of conviction. And he said that he could give fair consideration to evidence the defendants offered in mitigation. Judge Clark rejected the defense challenge.

T.W.

T.W. admitted to having formed an opinion on the defendants' guilt and said she did not believe it was acceptable that the defense did not have to prove mitigating factors beyond a reasonable doubt. Yet she said that her opinion on guilt was based on pretrial publicity and that she could set it aside and decide the case fairly on the evidence. She also said she was personally opposed to the death penalty but could apply it if the law required her to do so. T.W. said she could give fair consideration to mitigating evidence, even if the State proved the crimes were committed in an especially heinous, atrocious, or cruel manner. She also affirmed that she would hold the State to its burden on sentencing.

The defense challenged T.W. for cause, but not on her views on the death penalty. They challenged her because of her preconceived ideas about guilt.

Judge Clark rejected the challenge, ruling that T.W. had confirmed her ability to set those ideas aside and judge the case based on the evidence and law.

The Standard of Review and Legal Framework

K.S.A. 22-3410(2)(i) provides that a district judge may remove a prospective juror for cause where "[h]is [or her] state of mind with reference to the case or any

of the parties is such that the court determines there is doubt that he [or she] can act impartially and without prejudice to the substantial rights of any party." We have held

> "that challenges for cause are matters left to the sound discretion of the trial court, which is in a better position to view the demeanor of prospective jurors during voir dire. A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is clearly erroneous or amounts to an abuse of discretion." *Kleypas*, 272 Kan. at 991 (citing *State v. Dixon*, 248 Kan. 776, 788, 811 P.2d 1153 [1991]).

K.S.A. 22-3410 is designed to protect a criminal defendant's Sixth Amendment right to trial by an impartial jury, a right reinforced by the defendant's Fifth Amendment right to due process. See *Ristaino v. Ross*, 424 U.S. 589, 597-98, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976). These protections are incorporated into and made applicable to the states through the due process provisions of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145-149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). When applied to the jury selection process in a capital trial, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. See *Witherspoon v. Illinois*, 391 U.S. 510, 521, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). This right is balanced against the State's strong interest in seating jurors who are able to apply the sentence of capital punishment within the framework provided for by the federal Constitution and state law. 391 U.S. at 521.

In *Witherspoon*, decided in 1968, the United States Supreme Court struck a balance between the competing interests and held "'that a sentence of death could not be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'" *Kleypas*, 272 Kan. at 991-92 (citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 [1985]). *Witherspoon* recognized a distinction of constitutional significance between prospective jurors who have strong opinions about the death penalty and those whose views would prevent them from applying the law; the former remain eligible to serve, while the latter must be excused. See 391 U.S. at 519-21. And the Court's 1985 *Witt* decision

> "clarified the standard for determining when a prospective juror may be excluded for cause because of his or her views on the death penalty. The Court stated that a prospective juror may be excluded for cause because of his or her views on capital punishment where 'the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" *Kleypas*, 272 Kan. at 991 (quoting *Witt*, 469 U.S. at 424).

See *Lockhart v. McCree*, 476 U.S. 162, 184, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986) ("the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on

the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case").

In *Witt*, "The Court recognized that 'this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."'" *Kleypas*, 272 Kan. at 991 (quoting *Witt*, 469 U.S. at 424).

On appeal, the question before us is not whether we would have agreed with a district judge's decision on a strike for cause prompted by a panel member's opinion on the death penalty but whether the district judge's decision is fairly supported by the record. *Witt*, 469 U.S. at 434; see *Darden v. Wainwright*, 477 U.S. 168, 176, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (appellate courts must examine context surrounding prospective juror's exclusion, qualification). If the record contains conflicting or ambiguous information, the United States Supreme Court has expressed its belief that deference is owed to "the trial court, aided as it undoubtedly was by its assessment of [the prospective juror's] demeanor." *Witt*, 469 U.S. at 434.

Record Support for Judge Clark's Rulings

When we consider, as we must, the universe of information from the jury questionnaires and voir dire of M.W. and the 11 jurors the defendants compare to him in support of their argument on this issue, it is apparent that Judge Clark's rulings are fairly supported by the record. See *Brooks v. Armco, Inc.*, 194 S.W.3d 661, 664 (Tex. App. 2006) ("In reviewing the trial court's decision on challenges for cause, we must consider the entire examination, not just answers that favor one side over the other.").

With regard to M.W. specifically, his remarks in response to the questionnaire and to questions from counsel at voir dire were inconsistent. But he finally confirmed to the judge that he could never vote to impose a sentence of death. This response demonstrated that M.W. was not qualified to sit on the jury in this case under K.S.A. 22-3410(2)(i). And, even if it were less definite, we would defer to the district judge who was able to evaluate M.W.'s demeanor and nonverbal communication, here, whether he had stopped vacillating and given a clear answer. Although it would have been better, as mentioned in Section 1 of this opinion on venue, if the judge had gotten to his final destination on M.W. without asking a leading question, we are satisfied that he did not abuse his discretion in excusing M.W. See *State v. Johnson*, 253 Kan. 75, 85, 853 P.2d 34 (1993) (district judge did not abuse discretion in excusing juror, despite declaration of ability to be fair to both sides, understanding that personal experiences not to be taken into account; panel member acknowledged four times that friends' negative experiences with law enforcement might interfere with her obligations as juror); see also *People v. Ayala*, 24 Cal. 4th 243, 275, 99 Cal. Rptr. 2d 532, 6 P.3d 193 (2000) (trial judge properly exercised discretion to remove prospective juror for cause after she said she did not believe she had strength to sentence another person to die; reviewing courts should defer to trial court when prospective juror unclear); *Humphreys v. State*, 287 Ga. 63, 72, 694 S.E.2d 316 (2010) (appellate court refuses to substitute its judgment for trial court's when three prospective jurors' statements equivocal, contradictory about ability to give meaningful consideration to three sentencing options); *Russeau v. State*, 171 S.W.3d 871,

879 (Tex. Crim. 2005) ("When a prospective juror's answers are vacillating, unclear, or contradictory, we accord deference to the trial court's decision. We will not second-guess the trial court when the prospective jurors are persistently uncertain about their ability to follow the law.").

Furthermore, we are not persuaded otherwise by the defendants' insistence that Judge Clark applied a differential standard as between M.W. and the 11 persons to whom M.W. is compared. Each of the 11 assured the judge that he or she could put aside personal opinions and decide this case on the evidence and the law. The fact that many of them shared one characteristic with M.W.—intermittent equivocation on whether he or she could do what would be asked of him or her—does not change the other, more salient fact: The 11 ultimately professed ability and willingness to discharge their duties as jurors. One did not—M.W. Again, we see no abuse of discretion by Judge Clark. See *State v. Nix*, 215 Kan. 880, 882-83, 529 P.2d 147 (1974) (no abuse of discretion to deny challenge for cause; prospective juror confirmed ability to listen to evidence, decide case on evidence, court's instructions).

Failure to Excuse W.B., D.R., D.Ge, and H.Gu. for Cause

The defendants argue that Judge Clark abused his discretion by denying their challenges against jurors W.B., D.R., D.Ge., and H.Gu for cause because these panel members' voir dire responses established that they would impose a sentence of death automatically upon conviction or could not consider and give effect to mitigating evidence, *i.e.*, they were "mitigation impaired."

The State responds that each of the four prospective jurors stated unequivocally that he or she would follow the court's instructions, even if they required a life sentence.

Additional Factual and Procedural Background

W.B.

W.B. expressed his support for the death penalty in his responses to the questionnaire. However, during the State's voir dire, W.B. said he could give fair consideration to the evidence and apply the law. He said he understood a juror's statutory duty to weigh aggravating circumstances against mitigating circumstances, and he expressed no objection to or concern with voting for a life sentence if the law required that result.

Under questioning by counsel for R. Carr, W.B. said that he had supported the death penalty "for almost forever." When counsel for J. Carr asked why, W.B. said, "[W]hy not?" He then said that he supported the death penalty because it was the law of Kansas and served a societal purpose.

During continued voir dire by J. Carr's counsel, Ron Evans, the following exchange occurred:

> "J. Carr's Counsel: Do you think after you convicted them, if you convict them, after you convict them of capital murder you would be leaning toward a death sentence?
>
> "W.B.: According to the law, yes.
>
> "J. Carr's Counsel: What if the Judge instructed you that you have to have an open mind, even

after you've convicted them of capital murder, as to what sentence you should impose?

"W.B.: I'm pretty sure the Judge would give us some kind of parameter of how open your mind should be.

"J. Carr's Counsel: It should be completely open, as relates to—to the sentence.

"W.B.: To the sentence, it would still be death.

"J. Carr's Counsel: You would lean toward death based on your conviction of capital murder?

"W.B.: Right.

"J. Carr's Counsel: That scale that's on the judge's desk, you're saying that that scale, after you convicted them of capital murder, would be tilting toward death?

"W.B.: Yes."

Counsel for J. Carr suggested to W.B. that such a position was likely to interfere with his ability to consider mitigating circumstances. W.B. disagreed, saying, "[Y]ou have to weigh it, you have to measure it, there has to be some storybook, you have to hear the evidence[;] you've got to know the facts." W.B. then said he held no opinion on whether the death penalty should be applied in this case.

The defense challenged W.B. for cause, asserting that he was mitigation impaired.

Before ruling on the challenge, Judge Clark said, "I don't hear [him] saying that. I hear him saying he would be willing to follow the instructions of law,

weighing mitigators and aggravators and make a decision in his best judgment as he sees the facts in light of the law." He then asked W.B. whether that was an accurate interpretation of his testimony. W.B. said it was.

Judge Clark rejected the defense challenge.

D.R.

D.R. expressed strong support for the death penalty in her questionnaire responses. Yet she agreed in voir dire that the death penalty should not be imposed automatically upon conviction and that the State would need to prove that it was an appropriate sentence. D.R. identified several mitigating circumstances set out in the questionnaire as aggravating circumstances, but she said in voir dire that those responses were based on an incomplete understanding of the capital sentencing process. Once she became aware of the sentencing phase, she expressed her willingness and ability to consider all mitigation evidence.

During voir dire by counsel for R. Carr, D.R. said she would listen and give fair consideration to his mitigation evidence. But she expressed doubt that certain mitigators, such as the age of a defendant or the defendant's minor role in the offense could excuse or justify the crimes that formed the basis of the charges.

Judge Clark made further inquiry of D.R.:

"THE COURT: I think Miss R. is misunderstanding the questions being put in such a way. Let me say this: Should you be chosen to serve on the jury, you will receive a

very detailed set of instructions rather than just two, and whether or not one aided or assisted or abetted in a crime would be determined in the guilt part.

"If your guilt was not as great, that might be determined, but if there is a possibility that the jury would say it doesn't make any difference on participation, he's guilty of capital murder, then you would take that evidence that the participation was relatively minor. Then you make a decision as to what would be the proper penalty under the facts for the individual who had a relatively minor role, whether it be the getaway man or didn't know anybody was going to be killed, whatever the situation, you would consider it but you would consider it for a different reason when you are trying to figure out what the proper penalty is to be assessed against that individual under this set of facts.

"D.R.: Right.

"THE COURT: There's probably been 20 years of litigation up in the Supreme Court of the United States and the State of Kansas. I think what you are confusing is these two parts. As you just said awhile ago, you didn't know any of that August 28th and here it's given to you this morning in a brief set and asked questions about it, and if you are saying that under no circumstances at all would you consider these mitigating factors.
If there is no set of facts that would influence you to consider age or what part somebody played in a crime going forward, should a

sentence of less than death be imposed, you are not a proper person for this jury.

"But if you are saying that you can consider anything they bring forward and you'll look at it and you'll weigh it if they prove any aggravating factors, you'll weigh it and make your decision by weighing what you think the mitigators and the aggravators are worth and listen to one of these and make a decision on what is the proper penalty to be imposed on that individual under this set of facts. Is that what you are saying?

"D.R.: Yes.

"THE COURT: Okay."

Still later, during voir dire by counsel for R. Carr, when asked whether she could follow the law, D.R. said, "I'll do what the Judge tells me." Counsel said that people sometimes want to follow the law but cannot because of their beliefs; he asked whether D.R. agreed with this observation. D.R. replied, "You can't step outside the law. You have to follow the law." Then counsel asked D.R. if she could set aside her beliefs and follow the law. D.R. answered, "I can try. That is all I can say. I'm sorry."

The defendants challenged D.R. for cause, arguing that she "cannot tell us that she can follow the law. She says she will try but that's no assurance."

Again, Judge Clark spoke directly to D.R.:

"THE COURT: I don't think that was the question. The answer was I'll try. Will you follow the law that I say applies in the case?

"D.R.: Yeah.

"THE COURT: Will you base your decision on the evidence in the case and not on any preconceived notions or anything?

"D.R.: Yeah, because I only read the silly headlines anyway. They don't say much.

"THE COURT: Well, I think they were talking more about the preconceived notion about what you thought concerning the death penalty, what ought to happen concerning the death penalty.

"D.R.: No. Whatever you tell me, I'll follow the law."

The judge then rejected the defendants' challenge.

D.Ge.

D.Ge., discussed above as a comparison prospective juror for M.W., at times expressed unwillingness to consider a sentence other than death in the face of certain aggravating circumstances. But D.Ge. said on voir dire by the State that he understood a jury could not impose the death penalty automatically upon conviction. He also said that he would apply the law and could impose a life sentence if the evidence and law supported that outcome. D.Ge. confirmed that he could not impose a sentence of death if the State had failed to carry its burden to prove aggravating circumstances outweighed mitigating circumstances.

The defense challenged D.Ge. for cause, and Judge Clark rejected the challenge.

H.Gu.

During voir dire by counsel for R. Carr, H.Gu. was asked what sentence she would support, assuming the defendants were convicted of the capital murder charges. She initially said she would need to be "convinced" that a sentence other than death was appropriate. Explaining herself later in voir dire, H.Gu. said that she had been confused by the question; she thought counsel for R. Carr was asking about the verdict on the guilt phase, not about the sentencing phase. After counsel for R. Carr and Judge Clark clarified the law governing capital sentencing proceedings, H.Gu. said without equivocation that she would set aside her personal beliefs and apply the law as instructed. She also said she would give fair consideration to the defendants' mitigation case.

The defense challenged H.Gu. for cause, and Judge Clark rejected the challenge.

The Standard of Review and Legal Framework

The same standard of review and legal framework applicable to a district judge's decision to excuse a prospective juror who cannot set aside his or her objection to the death penalty applies equally to decisions not to excuse prospective jurors challenged for cause based on their inability to consider a sentence other than death. See *Morgan v. Illinois*, 504 U.S. 719, 728-29, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (applying *Witherspoon*, 391 U.S. at 518, and *Witt*, 469 U.S. at 423-24). The United States Supreme Court has explained:

> "A juror who will automatically vote for the death penalty in every case will fail in good faith

> to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence." *Morgan*, 504 U.S. at 729.

In addition to a defendant's rights under the Sixth Amendment and the Fifth Amendment's Due Process Clause, the Eighth Amendment right not to be subjected to cruel and unusual punishment requires jurors in a death penalty case to be able to give consideration to evidence of mitigating circumstances. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (sentencer, in all but rarest capital case, must not be precluded from considering, as mitigating factor, any aspect of defendant's character, record, or circumstances of offense).

Record Support for Judge Clark's Rulings

The defendants assert that these four prospective jurors should have been removed for cause because they were mitigation impaired. In their view, these four prospective jurors confirmed that they would impose a sentence of death automatically upon conviction and/or they confirmed they could not fairly consider mitigating circumstances.

The defendants are correct that selected passages from the questionnaire and voir dire responses of these four prospective jurors yield cause for concern, but the entirety of the record on them convinces us that it fairly supports Judge Clark's rulings. Again, our resolution of this issue has been complicated by the judge's use of leading questions, particularly glaring in his rehabilitation of W.B. and his rehabilitation—twice —of D.R. But all four jurors eventually professed understanding of and fidelity to the law governing the jury's role and function in capital sentencing. Thus we conclude that Judge Clark did not abuse his discretion in refusing to excuse them for cause. See *Reaves v. State*, 639 So. 2d 1, 4 (Fla. 1994) (no error in denial of challenge to four prospective jurors who suggested they would vote automatically for death penalty in event of conviction; record contained evidence prospective jurors rehabilitated); *Brockman v. State*, 292 Ga. 707, 739 S.E.2d 332, 347 (2013) (trial court did not err by rejecting challenges for cause; "When viewed as a whole, the voir dire of [two jurors] shows that, while they indicated a leaning toward the death penalty, they would listen to all the evidence and would fairly consider both sentencing options."); *Humphreys v. State*, 287 Ga. 63, 72, 694 S.E.2d 316 (2010) (no abuse of discretion when trial court denied challenges on six panel members; all six jurors "expressed a leaning toward the death penalty, [but] they all stated that they would listen to and consider mitigating evidence and that they could give fair consideration to and vote for each of the three sentencing options"); *State v. Odenbaugh*, 82 So. 3d 215, 238-241 (La. 2011), *cert. denied* 133 S. Ct. 410 (2012) (no abuse of discretion to deny challenge for cause, although juror repeatedly stated death penalty justified in circumstances like

those at issue in case, could not find situation in which life sentence would be proper under similar facts; juror did not suggest he would automatically impose death penalty upon conviction); *Leatherwood v. State*, 435 So. 2d 645, 654 (Miss. 1983) (no abuse of discretion in denying challenge for cause when prospective jurors strongly supported death penalty; "[w]hen questioned by counsel both jurors said that they could put aside their personal feelings, follow the law and instructions of the court[,] return a verdict based solely upon the law and the evidence[,] and not vote for the death penalty unless the evidence warranted it."); *State v. Braden*, 98 Ohio St. 3d 354, 360, 785 N.E.2d 439 (2003) (trial court in capital murder prosecution not required to grant challenge for cause to prospective juror who stated he would automatically go to death sentence upon finding defendant guilty; prospective juror stated he would have to hear all facts before making decision, would have to consider the alternatives, would have to weigh mitigating factors; other responses showed commitment to being fair-minded); *Moore v. State*, 999 S.W.2d 385, 400 (Tex. Crim. 1999) ("When the record reflects that a venireman vacillates or equivocates on his ability to follow the law, the reviewing court must defer to the trial court.").

Violation of Section 7 of the Kansas Constitution Bill of Rights

R. Carr also argues on this appeal that Judge Clark violated Section 7 of the Kansas Constitution Bill of Rights by excusing six prospective jurors—K.J., M.G., H.D., C.R., D.H., and M.B.—based on their religious opposition to the death penalty.

Additional Factual and Procedural Background

Judge Clark excused these jurors because they said they could not impose the death penalty under any circumstance. K.J. said that her objection to the death penalty was "[n]ot only religious. There are other beliefs also that I feel that way." M.G. relied on religious beliefs and general beliefs that the death penalty was morally unjust and humans should not be killing other humans. H.D. said she objected to the death penalty on moral and religious grounds; she said the two could not be separated easily because her moral code was founded upon or influenced by her religion. C.R. testified that her own personal moral code prevented her from imposing the death penalty under any circumstance. D.H. expressed moral and religious opposition to the death penalty, which would prevent him from supporting any sentence other than life imprisonment. M.B. stated that his religious views, life experience, upbringing, and personal moral code would prevent him from supporting a sentence of death under any circumstance.

The Standard of Review and Legal Framework

Section 7 of the Kansas Bill of Rights provides that "[n]o religious test or property qualification shall be required for any office of public trust." We have held that this section "does not provide any greater limitation than already provided under K.S.A. 43-156," *Kleypas*, 272 Kan. at 993, which provides that "[n]o person shall be excluded from service as a grand or petit juror in the district courts of Kansas on account of . . . religion . . . ."

Meanwhile, K.S.A. 22-3410(2)(i) provides that a prospective juror may be challenged for cause as unqualified to serve when he or she is partial or biased. A person who admits that he or she cannot follow the law requiring imposition of the death penalty in specific situations is, by definition, unqualified by partiality. See *State v. Campbell*, 217 Kan. 756, 765, 539 P.2d 329 (1975) (allegation of discrimination in selection of jury necessarily requires showing recognizable, identifiable class of persons, otherwise entitled to be jury members, purposefully, systematically excluded) (citing *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 [1953]).

We recognize and acknowledge the existence of some tension between these statutes. The necessity of and process to achieve "death qualification" of jurors under K.S.A. 22-3410(2)(i) butts up against K.S.A. 43-156 when the reason a prospective juror can never participate in imposition of the death penalty, compelling removal of that person for cause, has a basis in a religious code.

This tension is resolved with a fine distinction with its roots in family law. We recently decided *Harrison v. Tauheed*, 292 Kan. 663, 256 P.3d 851 (2011), a case involving parents in conflict over custody of their child because of the mother's religious faith and related practices. In *Tauheed*, we drew a line between belief and behavior. We cautioned district judges resolving such disputes, instructing them to avoid discrimination between parents on the basis of religious belief or lack of belief but to act as required when behavior prompted by the belief or lack of belief was incompatible with the best interests of the child. 292 Kan. at 683-84.

Like parents, jurors cannot be discriminated against on the basis of their religious belief or lack of belief. But they can be excluded from jury service when their belief or nonbelief makes it impossible for them to act in conformance with the signature requirement of that service: impartiality under the rule of law.

Judge Clark did not abuse his discretion or violate Section 7 of the Kansas Constitution Bill of Rights or K.S.A. 43-156 when he excused K.J., M.G., H.D., C.R., D.H., and M.B. for cause. See *Kleypas*, 272 Kan. at 993 (no violation of Kansas Constitution Bill of Rights, statute when prospective jurors excused for inability to be impartial, follow oath).

5. Reverse *Batson* Challenge to Peremptory Strike

R. Carr argues that Judge Clark failed to follow the three steps required under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), when he refused to permit the defense to exercise a peremptory challenge to remove W.B from the jury. W.B., like the defendants, is a black man. R. Carr argues further that Judge Clark's error was structural and entitles him to reversal of all of his convictions on all counts. The State responds that Judge Clark did not err, and, in the alternative, that any error was harmless.

Additional Factual and Procedural Background

Of the panel of 60 prospective jurors qualified for final selection in this case, 3 were black, C.B., D.M., and W.B.

During individual voir dire, the defendants passed C.B. and D.M. for cause. The State challenged D.M. for cause based on his death penalty views. The defense successfully rehabilitated D.M., and the trial court rejected the State's for-cause challenge. The State later exercised peremptory challenges to remove both C.B. and D.M. The defendants lodged an unsuccessful *Batson* challenge to the State's strike of C.B. The defendants were successful in keeping D.M. on the jury.

The defendants had challenged W.B. for cause unsuccessfully, as discussed in Section 4 of this opinion. Then R. Carr attempted to exercise his 12th, and last, peremptory strike against W.B.; and the State lodged a *Batson* challenge, arguing that the defense was striking "one of the remaining black males that we have." Counsel for R. Carr replied:

> "First, Your Honor, I think they have to make the prima [facie] case that I have engaged in a pattern of challenging based on race. I don't think they've done that.
>
> "Secondly, with the number of jurors having—I have to shepherd my peremptory challenges and not use them promiscuously. [W.B.] based on an answer on voir dire is one of the mitigation-impaired jurors we have. He told us he was in favor of death on most, if not all, of the mitigating circumstances. He left blank—he gave inconsistent answers with regard to the same. After being questioned, rehabilitated and questioned again, he indicated on the record that after a conviction he would be leaning towards death.

> "Lastly, in response to Mr. Evans' question, why are you in favor of the death penalty, based on my listening to [W.B.], he answered in a sarcastic and contemptuous manner, ['] why not[']. This is not a racial challenge—there is not a racial reason for my challenge of [W.B.]"

Judge Clark sought no more comment from the prosecution. Then he said:

> "To me it works both ways. Once it's raised, then the reason that's adequate under law must be stated. I find that the reason stated might be supported under a certain interpretation but they are not adequate under the law. I will sustain the *Batson* challenge."

Counsel for J. Carr then announced that he too would exercise his final peremptory challenge to remove W.B. Anticipating the State would reassert its objection to the strike under *Batson*, counsel spoke, first referencing W.B.'s responses on the jury questionnaire:

> "Our reasons for exercising a preempt on W.B. have absolutely nothing to do with his color. When I—when I got these questionnaires, obviously we didn't know the color of W.B. and I had him rated at the very—as one of the very worst jurors of the first panel. I rated this based on his answers. On his marking 5 on the death penalty scale, that didn't make him one of the worst, but it started making me think that perhaps he would not be a favorable juror, especially on a death penalty case. He circled 'D,' in favor, based on the law and the facts. It's

another factor, though, that I look at in trying to rate the jurors. I still don't know whether he's white or black.

"I come down, I look at his markings on the aggravators and mitigators. He thinks that the defendant not having a significant history of prior criminal activity is an aggravator. He marked 'F.' He also marked 'F,' in favor of the death penalty, on the mitigator and statutory mitigator 'E.' He marked 'F' on a third statutory mitigator, 'I' the defendant acted under extreme distress or substantial domination of another person. He also marked 'F' on that statutory mitigator. He left 'M,' that's the age mitigator, blank. It is my memory, and I don't have any notes on this, it seems like someone asked him about that and I don't think he expressed any interest in that being any sort of mitigation, the age of the defendant.

"Based on those answers, I had W.B. rated, at least from Jonathan Carr's perspective, as a very poor juror. And it surprised me when, frankly, it probably shouldn't have, it surprised me when he hit the juror box and I saw he was an African-American man.

"When he was questioned, I didn't—didn't take his answers to be favorable to us at all. And I would reiterate the reasons stated by [R. Carr's counsel]. It's my memory when we asked him those questions about which way he was leaning, if they found Jonathan Carr guilty of capital murder, he said he would be leaning toward death. And I was the one questioning

him and I was looking him right in his eye when I asked him, why are you for death. And it was me that he focused with his eyes, and I took it to be part sarcasm, and I saw some contempt in his eyes when he said to me, why not. And I gave him the laundry list of reasons why, you know, the of why people are for the death penalty. And again, when he answered that, when I was trying to help him, give him a reason, I found his answer very unsatisfactory. Not a thoughtful answer.

"And last, but certainly not least, Judge, we voted to strike W.B. for cause. We think that he—you know, with all due respect to you, Judge, I respect your ruling, but we moved for you to excuse him for cause because we think he's mitigation impaired. I don't think we have any choice but at least to move him excused—certainly peremptory challenge or we waive that error. I mean he is as bad a juror from a death perspective. I think he is the worst juror from a death perspective Jonathan Carr could possibly have that's left on the panel. And that has nothing—nothing to do with the fact he's an African-American man. I would have been for striking him regardless of his race based on his answers. So those are my racially neutral reasons. It has nothing to do with the fact W.B. is an African-American. We move—he's our 12th challenge."

Judge Clark confirmed that the State intended to challenge the exercise of J. Carr's peremptory strike of

W.B. and, without hearing further argument, sustained the challenge.

Judge Clark seated W.B. on the jury, and W.B. was elected Presiding Juror.

Batson's *Requirements and Standards of Review*

Batson's central teaching is that the Equal Protection Clause of the Fourteenth Amendment forbids the prosecution from engaging in purposeful discrimination on the basis of race when it exercises peremptory challenges. 476 U.S. at 89; *State v. Hood*, 242 Kan. 115, 123, 744 P.2d 816 (1987) (adopting *Batson* framework). This prohibition was extended to a criminal defendant's use of peremptory challenges in *Georgia v. McCollum*, 505 U.S. 42, 46-55, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). When the State challenges a peremptory strike under *McCollum*, such a challenge has come to be known as a "reverse *Batson*" challenge. *United States v. Thompson*, 528 F.3d 110, 115 (2d Cir. 2008).

A district judge's handling of a *Batson* or reverse *Batson* challenge involves three steps, each subject to its own standard of review on appeal. See *State v. McCullough*, 293 Kan. 970, 992, 270 P.3d 1142 (2012) (citing *State v. Hill*, 290 Kan. 339, 358, 228 P.3d 1027 [2010]; *State v. Pham*, 281 Kan. 1227, 1237, 136 P.3d 919 [2006]).

"Under the first step, the party challenging the strike must make a prima facie showing that the other party exercised a peremptory challenge on the basis of race." *McCullough*, 293 Kan. at 992. "Appellate courts utilize plenary or unlimited review over this step." 293 Kan. at 992 (citing *Hill*, 290 Kan. at 358).

"[I]f [a] prima facie case is established, the burden shifts to the party exercising the strike to articulate a race-neutral reason for striking the prospective juror. This reason must be facially valid, but it does not need to be persuasive or plausible. The reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The opponent of the strike continues to bear the burden of persuasion." *McCullough*, 293 Kan. at 992 (citing *Hill*, 290 Kan. at 358). The scope of review on a district judge's ruling that the party attempting the strike has expressed racially neutral reasons is abuse of discretion. *State v. Sledd*, 250 Kan. 15, 21, 825 P.2d 114 (1992) (citing *Smith v. Deppish*, 248 Kan. 217, 807 P.2d 144 [1991]).

In the third step, the district judge determines whether the party opposing the strike has carried its burden of proving purposeful discrimination. "This step hinges on credibility determinations because usually there is limited evidence on the issue, and the best evidence is often the demeanor of the party exercising the challenge. As such, it falls within the trial court's province to decide, and that decision is reviewed under an abuse of discretion standard." *McCullough*, 293 Kan. at 992 (citing *Pham*, 281 Kan. at 1237; *Hill*, 290 Kan. at 358-59). As set forth above, judicial discretion is abused if judicial action is arbitrary, fanciful, or unreasonable; or based on an error of law or fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

Preservation

The State asserts that the defendants waived their right to pursue this issue on appeal by failing to object to the judge's procedure in district court. Although there may be a debatable fact question on this point,

because this is a death penalty case, K.S.A. 2013 Supp. 21-6619(b) makes this preservation attack beside the point. The statute requires us to consider all errors asserted on appeal in a death-penalty case. See *State v. Cheever*, 295 Kan. 229, 241, 284 P.3d 1007, *cert. granted in part* 133 S. Ct. 1460 (2013), *vacated and remanded on other grounds* 134 S. Ct. 596 (2013).

Judge Clark's Error

We have no hesitation in ruling that Judge Clark erred in his consideration and grant of the State's reverse *Batson* challenge to each of the defendants' peremptory strikes of W.B.

The record establishes that, after the State raised its objections to the defendants' strikes of W.B.—merely pointing out on R. Carr's strike that W.B. was "one of the remaining black males that we have" in the venire and merely answering, "Yes, your honor," when the judge asked if the prosecution intended to renew its objection on J. Carr's strike—Judge Clark did not make a finding on the record that the State had established a prima facie case of discrimination. Moreover, defense counsel for R. Carr and J. Carr each articulated more than one race-neutral reason for striking W.B., including his demeanor and death penalty views. See *State v. Angelo*, 287 Kan. 262, 274-75, 197 P.3d 337 (2008) (recognizing this court has upheld peremptory strikes based on counsel's intuition, interpretation of juror demeanor, body language); *Smith v. Deppish*, 248 Kan. 217, 229, 807 P.2d 144 (1991) (characteristics of juror's nonverbal communication, demeanor race-neutral); see also *United States v. Barnette*, 644 F.3d 192, 215 (4th Cir. 2011) *cert. denied* 132 S. Ct. 1740 (2012) (wavering

personal view of death penalty race-neutral basis for strike under *Batson*); *Berry v. State*, 802 So. 2d 1033, 1042 (Miss. 2001) ("A challenge . . . based upon a juror's views on the death penalty is an acceptable race neutral reason."). Again, Judge Clark did not articulate why the reasons given by the defense in the second *Batson* step were inadequate; he did not hear any argument from the State on why the reasons stated by defense counsel should be dismissed as pretextual. Then Judge Clark simply sustained the State's challenges, gliding by the third step under *Batson* entirely.

The State's reliance on our decision in *Angelo*, 287 Kan. 262, to persuade us otherwise is misplaced. *Angelo* is distinguishable from stem to stern.

First, in that case, we reviewed an unsuccessful *Batson* challenge by the defense; it did not review a successful reverse *Batson* challenge by the State. In addition, the record was clear in that case that the district judge heard argument from the parties on each step of the required analysis before ruling. This court noted: "Specifically, after initially stating that it had not detected a pattern of discrimination, [the district judge] heard the State's reasons and supporting information for striking the jurors and then asked for, and received, [the defendant's] responses." 287 Kan. at 274. This directly enabled our holding that the district judge had considered all of the information and "impliedly held [the defendant] failed to prove that the State's reasons were pretextual and that he therefore failed in his ultimate burden to prove purposeful discrimination." 287 Kan. at 275. What happened in

Angelo did not happen here, and it is not persuasive authority.

An exercise of discretion built upon an error of law qualifies as an abuse of that discretion. See *State v. White*, 279 Kan. 326, 332, 109 P.3d 1199 (2005) ("[A]buse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law."). Judge Clark abused his discretion on the State's reverse *Batson* challenge to the defendants' peremptory strikes of W.B.

Harmlessness

R. Carr argues that Judge Clark's error was structural. The State urges us to apply harmless error analysis.

Our examination of these opposing viewpoints begins with a review of the United States Supreme Court's decision in *Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009).

In *Rivera*, the Court held that state courts have the authority to determine the appropriate remedy when a trial court judge erroneously denies a defendant's peremptory challenge in good faith. Defendant Michael Rivera attempted to exercise a peremptory challenge against a Hispanic juror. 556 U.S. at 152-53. The trial court erroneously denied Rivera's peremptory strike, exercising a *sua sponte* reverse *Batson* challenge. The juror eventually was elected foreperson of the jury, and Rivera was found guilty. 556 U.S. at 153-54. The Illinois Supreme Court agreed that the trial judge erroneously granted the reverse *Batson* challenge, but it rejected the notion that such error was reversible

absent a showing of prejudice. 556 U.S. at 155. The United States Supreme Court granted certiorari "to resolve an apparent conflict among state high courts over whether the erroneous denial of a peremptory challenge requires automatic reversal of a defendant's conviction as a matter of federal law." 556 U.S. at 156.

The Court first characterized the right to peremptory challenge as one that arises under state law without federal constitutional protection:

> "[T]his Court has consistently held that there is no freestanding constitutional right to peremptory challenges. [Citation omitted.] We have characterized peremptory challenges as 'a creature of statute,' [citation omitted] and have made clear that a State may decline to offer them at all. [Citations omitted.] When States provide peremptory challenges (as all do in some form), they confer a benefit beyond the minimum requirements of fair [jury] selection, [citation omitted] and thus retain discretion to design and implement their own systems [citation omitted].
>
> "Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. 'A mere error of state law,' we have noted, "is not a denial of due process." [Citations omitted.] The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness in a criminal trial.' [Citations omitted.]" 556 U.S. at 157-58.

Accordingly, the Court left the duty to tailor appropriate relief for deprivations of this state law right to the state courts:

> "Absent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require automatic reversal. States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error per se. Or they may conclude, as the Supreme Court of Illinois implicitly did here, that the improper seating of a competent and unbiased juror does not convert the jury into an ultra vires tribunal; therefore the error could rank as harmless under state law." 556 U.S. at 161-62.

Under *Rivera*, the first issue we must decide is whether Judge Clark acted in good faith. If not, his error offends Fifth and Fourteenth Amendment due process protections and may require automatic reversal of all of R. Carr's convictions. See *Bell v. Jackson*, 379 F. Appx. 440, 445 (6th Cir. 2010) ("*Rivera* leaves open the possibility that a *Batson* error might require reversal as a matter of due process if the trial judge repeatedly or deliberately misapplie[s] the law or act[s] in an arbitrary or irrational manner."). If, on the other hand, Judge Clark acted in good faith, his error does not implicate federal constitutional guarantees, and the decision on its remedy is a matter of state law.

At least two courts have considered a trial judge's good and bad faith and their effects since *Rivera*.

In *Pellegrino v. AMPCO System Parking*, 785 N.W.2d 45 (Mich. 2010), the Michigan Supreme Court considered a trial court's ruling on a reverse *Batson* challenge in a civil action. The court first observed that *Rivera* "contrasted a judge's good-faith mistake with one arising because the judge deliberately misapplied the law or because the judge had acted in an arbitrary or irrational manner." 486 Mich. at 350. The court determined that the trial judge "deliberately refused to follow the three-step process required under *Batson* because [the judge] thought that process required the court to 'indulge' in 'race baiting.'" 486 Mich. at 351. Despite never finding a *Batson* problem in the first place, the judge "arbitrarily proceeded" as if the State had established such a violation and disallowed the defendant's peremptory strike. 486 Mich. at 350-51. This required automatic reversal of the Court of Appeals decision, remand to the district court, and a new trial before a different judge. 486 Mich. at 354.

In *Chinnery v. Virgin Islands*, 55 V.I. 508, 2011 WL 3490267 (V.I. 2011), the Supreme Court of the Virgin Islands held that the trial judge erred in sustaining the prosecution's reverse *Batson* challenge, and the prosecution argued that the error should be deemed harmless. The court recognized that *Rivera* granted it the authority to decide the standard of reversibility or remedy in such a situation, as long as the judge's error was made in good faith. But this error was not made in good faith. During jury selection, the prosecution had challenged two of defendant's peremptory strikes under *Batson*. Defense counsel explained that the strikes were based on the jurors' social class and how they had looked at him. The judge responded: "I don't do that," and sustained the reverse *Batson* challenge. 2011 WL

3490267, at *7. Still, the judge allowed the defendant to use his peremptory challenge to remove one of the two jurors. The Virgin Islands Supreme Court reacted to this behavior by the trial judge:

> "[T]he Superior Court, like the judge in *Pellegrino*, denied [the defendant] his right to exercise his peremptory challenges based on its own personal preferences rather than a good-faith attempt to follow *Batson*. Moreover, even if the Superior Court initially acted in good-faith—which we have no reason to doubt—its ultimate decision to nevertheless allow [the defendant] to choose to strike one of the two prospective jurors—notwithstanding the fact that it had rejected [the defendant's] race-neutral explanation and upheld the People's *Batson* challenge with respect to both jurors—was inherently arbitrary and irrational." 2011 WL 3490267, at *7.

The court reversed and remanded for new trial, because the absence of good faith meant that the error rose to the level of a deprivation of due process. 2011 WL 3490267, at *7.

Here, the defense argument that Judge Clark's error was not made in good faith rests entirely on the fact that his application of the three steps of *Batson* was incomplete. But acceptance of this argument would tend to elevate every *Batson* error to one made in bad faith, and we are unwilling to take the first step in that direction. See *Bell*, 379 F Appx. at 445 ("But aside from the brevity with which the trial court addressed his objections, [the defendant] offers nothing to show that any error was more than" one made in good faith).

Instead, we have carefully examined the entire record to determine whether Judge Clark's conduct on the reverse *Batson* challenge was part of a pattern of hostile behavior toward the defense. As discussed throughout this opinion, although we have identified isolated instances in which Judge Clark's performance might have been improved, the record does not demonstrate that either his general performance or his specific decision on this reverse *Batson* challenge is deserving of the perverse distinction of a bad faith label. This case is different from *Pellegrino* and *Chinnery*, in which trial judges defied or refused to apply *Batson* analysis or appeared to reverse themselves in midstream. The record discloses no such deliberate or erratic conduct on the part of Judge Clark.

We turn now to the question of the remedy for a good faith mistake, a question delegated to us for decision by *Rivera*. A review of the positions taken by other state and federal courts reveals a split of authority.

Several states have concluded that reversal is automatically required when a trial court erroneously denies a defendant his or her right to exercise a peremptory challenge. The Iowa Supreme Court's decision in *State v. Mootz*, 808 N.W.2d 207 (Iowa 2012), outlines the arguments commonly advanced in support of a structural error approach well.

In *Mootz*, the defendant appealed his conviction for assault on a law enforcement officer resulting in bodily injury. During voir dire, the defense sought to use a peremptory strike to remove a Hispanic member of the venire, and the trial judge prevented it from doing so.

The judge ruled erroneously that the strike was based on the venire member's race, and he was seated on the jury and elected foreperson.

At the Iowa Court of Appeals level, the panel held that the trial judge erred by denying the defendant his right to exercise the peremptory strike, but it treated the mistake as harmless error. 808 N.W.2d at 214. The panel analogized to *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993), in which the Iowa Supreme Court had held that prejudice would not be presumed when a defendant was forced to "waste" a peremptory challenge to correct an erroneous denial of a challenge for cause. *Mootz*, 808 N. W. 2d at 221.

On review of the court of appeals decision, the Iowa Supreme Court distinguished *Neuendorf* and its more recent holding in *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006) (prejudice will not be presumed when court erroneously grants litigant's challenge for cause), because the *Mootz* venire member ultimately was seated on the jury, whereas prospective jurors in *Neuendorf* and *Summy* ultimately were not. The court also said it had limited ability to assess accurately what impact the objectionable juror had on the proceedings. 808 N.W.2d at 225. "A defendant could only show prejudice by showing that the juror he sought to remove was biased. However, if the juror were biased, then the juror would be removable for cause, and the question regarding the peremptory challenge would become moot." 808 N.W.2d at 225. The Iowa Supreme Court found it unacceptable that a defendant could be left with no remedy for a reverse *Batson* error, and it imagined the drafters of the state

rule governing peremptory strikes would feel the same. 808 N.W.2d at 225-26.

Appellate courts in Alabama, California, Connecticut, Florida, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New York, South Carolina, Vermont, Washington, and Wisconsin are in accord with Iowa in holding that reverse *Batson* error committed by a trial judge in good faith is structural; seven of them arrived at the position after *Rivera* was handed down, and eight before. See *Zanders v. Alfa Mut. Ins. Co.*, 628 So. 2d 360, 361 (Ala. 1993) (reversing judgment and remanding for new trial in *civil* action); *People v. Gonzales*, B224397, 2012 WL 413868 (Cal. Ct. App. 2012) (unpublished opinion) (where defendant forced to go to trial with a juror that they could not excuse due to an erroneously granted *Batson/Wheeler* [*People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978)] motion, error requires reversal); *State v. Wright*, 86 Conn. App. 86, 97-98, 860 A.2d 278 (2004) (reversing and remanding for new trial); *Elliott v. State*, 591 So. 2d 981, 987 (Fla. Dist. App. 1991) (reversing and remanding for a new trial); *Jackson v. State*, 265 Ga. 897, 899, 463 S.E.2d 699 (1995) (granting new trial without conducting harmless error analysis); *State v. Pierce*, 131 So. 3d 136, 144 (La. App. 2013) (denial of peremptory through erroneous Batson ruling "implicates a constitutional right guaranteed to the defendant by the State of Louisiana; thus, a harmless error analysis is inappropriate"); *Parker v. State*, 365 Md. 299, 311, 778 A.2d 1096 (2001) (granting new trial where trial judge erred in deeming the facially-valid, race-neutral reasons "unacceptable" and in reseating stricken jurors); *Commonwealth v. Hampton*, 457 Mass. 152,

164-65, 928 N.E.2d 917 (2010) ("We continue to adhere to the view [post-*Rivera*] that, for purposes of State law, the erroneous denial of a peremptory challenge requires automatic reversal, without a showing of prejudice."); *State v. Campbell*, 772 N.W.2d 858, 862 (Minn. App. 2009) (confirming structural error approach of Minnesota Supreme Court in *State v. Reiners*, 664 N.W.2d 826, 835 [Minn. 2003], will continue to be applied post-*Rivera*); *Hardison v. State*, 94 So. 3d 1092, 1101-02 (Miss. 2012) (follows lead of Iowa, Massachusetts, Minnesota, New York, Washington; post-*Rivera* "a trial court cannot deprive defendants of their right to a peremptory strike unless the trial judge properly conducts the analysis outlined in *Batson* when a trial judge erroneously denies a defendant a peremptory strike by failing to conduct the proper *Batson* analysis, prejudice is automatically presumed, and we will find reversible error"); *People v. Hecker*, 15 N.Y.3d 625, 662, 917 N.Y.S.2d 39, 942 N.E.2d 248 (2010) (refusing to depart from pre-*Rivera* precedent establishing automatic reversal as proper remedy when trial judge erroneously sustains reverse *Batson* challenge); *State v. Short*, 327 S.C. 329, 489 S.E.2d 209 (Ct. App. 1997), *aff'd* 333 S.C. 473, 511 S.E.2d 358 (1999) (automatic reversal proper remedy); *State v. Yai Bol*, 190 Vt. 313, 323, 29 A.3d. 1249 (2011) (reversal automatic where defendant "compelled to abide a juror not to his liking" as a result of erroneous *Batson* ruling); *State v. Vreen*, 143 Wash. 2d 923, 931, 26 P.3d 236 (2001) (erroneous denial of peremptory strike requires automatic reversal); *State v. Wilkes*, 181 Wis. 2d 1006, 513 N.W.2d 708 (Wis. App. 1994) (same) (unpublished opinion).

Several other states have chosen the path of the Illinois Supreme Court in *Rivera*—applying harmlessness analysis to reverse *Batson* errors made in good faith. For the most part, these courts reason that the primary purpose of statutory peremptory strikes is to ensure a defendant's right to trial by a fair and impartial jury. And, as long as all seated jurors are qualified and impartial, a defendant has suffered no constitutional injury and any error can be deemed harmless. See *State v. Darnell*, 209 Ariz. 182, 98 P.3d 617, 621 (Ct. App. 2004), *rev. denied and ordered depublished* 210 Ariz. 77, 107 P.3d 923 (2005) (harmless error review applies when trial court wrongly grants *Batson* challenge to defendant's use of peremptory strike); *Pfister v. State*, 650 N.E.2d 1198, 1200 (Ind. App. 1995) (harmless error applies; error in case could not be deemed harmless); *Moore v. Commonwealth*, 2011-SC-000700-MR, 2013 WL 1790303, at *4 (Ky. 2013) (unpublished opinion) (preserved *Batson* error subject to usual standards of harmless error analysis); *State v. Letica*, 356 S.W.3d 157, 165-66 (Mo. 2011) (erroneous *Batson* ruling resulting in denial of peremptory challenge subject to harmless error analysis; error harmless under facts); *Cudjoe v. Commonwealth*, 23 Va. App. 193, 203-04, 475 S.E.2d 821 (1996), *overruled on other grounds by Roberts v. CSX Transp., Inc.*, 279 Va. 111, 688 S.E.2d 178 (2010) (statutory harmless error statute supplants structural error; on record, unable to conclude error did not affect verdict).

In federal appellate courts, before *Rivera* was decided, the majority rejected harmlessness analysis when a trial judge erroneously prevented a defendant's peremptory challenge. See *Tankleff v. Senkowski*, 135

F.3d 235, 248 (2d Cir. 1998); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 159 (3d Cir. 1995); *United States v. Hall*, 152 F.3d 381, 408 (5th Cir. 1998); *United States v. McFerron*, 163 F.3d 952, 955-56 (6th Cir. 1998); *United States v. Underwood*, 122 F.3d 389, 392 (7th Cir. 1997), *cert. denied* 524 U.S. 937 (1998); *Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995); *United States v. Annigoni*, 96 F.3d 1132, 1143 (9th Cir. 1996) (en banc).

But these opinions were largely dependent upon language from *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965): "The denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." And the United States Supreme Court has now called this language into question.

In *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 782, 145 L. Ed. 2d 792 (2000), the Ninth Circuit had relied on *Swain* to support its holding that the trial court's erroneous denial of peremptory challenges required automatic reversal. The United States Supreme Court did not address this aspect of the Ninth Circuit's decision because it found no error, but it observed in dicta that "the oft-quoted language in *Swain* was not only unnecessary to the decision in that case—because *Swain* did not address any claim that a defendant had been denied a peremptory challenge—but was founded on a series of our early cases decided long before the adoption of harmless-error review." 528 U.S. at 317 n.4.

The Court took another swipe at the *Swain* language in *Rivera*, when it said that the language had

been "disavowed" in *Martinez-Salazar* and further observed that it

> "typically designate[s] an error as 'structural,' therefore 'requir[ing] automatic reversal,' only when 'the error necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' [Citation omitted.] The mistaken denial of a state-provided peremptory challenge does not, at least in the circumstances we confront here, constitute an error of that character." *Rivera*, 556 U.S. at 160.

Since *Rivera*, the Ninth Circuit has abandoned its earlier practice of treating a trial judge's erroneous denial of a defendant's peremptory challenge as structural error. See *United States v. Lindsey*, 634 F.3d 541, 544 (9th Cir. 2011) *cert. denied* 131 S. Ct. 2475 (2011). Other federal circuits have followed suit. *United States v. Gonzalez-Melendez*, 594 F.3d 28, 33-34 (1st Cir. 2010); *Jimenez v. City of Chicago*, 732 F.3d 710, 715 (7th Cir. 2013) *cert. denied* 134 S. Ct. 1797 (2014); *Avichail ex rel. T.A. v. St. John's Mercy Health Sys.*, 686 F.3d 548, 552-53 (8th Cir. 2012).

Kansas does not have a post-*Rivera* case on point.

Sixteen years before *Rivera* was decided, one Court of Appeals panel reversed a conviction when the trial judge erroneously interfered with a defendant's right to exercise a race-neutral peremptory challenge under K.S.A. 22-3412. *State v. Foust*, 18 Kan. App. 2d 617, 624, 857 P.2d 1368 (1993). The panel said: "Although it may seem minimal, the deprivation of even one valid

peremptory challenge is prejudicial to a defendant and may skew the jury process." 18 Kan. App. 2d at 624.

In this court's opinion in *State v. Heath*, 264 Kan. 557, 588, 957 P.2d 449 (1998), the defendant argued that the district judge's error in failing to remove an unqualified juror for cause deprived him of his statutory right to exercise one of his peremptory challenges. The defendant used a peremptory strike to correct the judge's mistake on the challenge for cause. We held any error was harmless, reasoning that "[t]he whole purpose of peremptory challenges is as a means to achieve an impartial jury [t]here is no evidence that the jury constituted was not impartial." 264 Kan. at 588.

In fact, this court long treated the Kansas peremptory challenge statute as little more than a procedural device to ensure compliance with a defendant's constitutional right to trial by a fair and impartial jury:

> "The constitutional guaranty is that an accused shall be tried by an impartial jury. The matter of peremptory challenges is merely statutory machinery for carrying out and securing the constitutional guaranty. Error in overruling a challenge to a juror is not ground for reversal unless the accused was prejudiced thereby. The real question is—'Was the jury which tried defendant composed of impartial members?' In the absence of any objection on the part of defendant to any member as it was finally drawn to try him we cannot say it was not impartial." *State v. Springer*, 172 Kan. 239, 245, 239 P.2d 944 (1952).

Although there are authorities from our sister states and the federal courts that come down gracefully on both sides of the issue, we are persuaded that an error such as the one committed in this case should be subject to harmlessness review. The mistake was made in good faith, and our Kansas precedent, although sparse, favors the view that a peremptory challenge is simply a procedural vehicle for vindication of a defendant's right to an impartial jury. The erroneous denial of a peremptory challenge does not require automatic reversal. This holding is not only permissible under *Rivera*, but also consistent with this court's development of harmless error review in recent years and the legislature's expressed preference for the same. See *Pabst v. State*, 287 Kan. 1, 13, 192 P.3d 630 (2008) (vast majority of errors fall within category of "trial error[s]" subject to harmless error review); K.S.A. 60-261 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); K.S.A. 60-2105 (appellate courts shall disregard "mere technical errors and irregularities" not affecting substantial rights).

Having already decided in the previous section that there was no error in denying the defense challenge for cause to W.B., we see no prejudice from his ultimate seating on the jury. R. Carr is not entitled to reversal of any of his convictions because of Judge Clark's error on the reverse *Batson* challenge. See *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012) (no reasonable probability that such error affected the outcome of the trial in light of the entire record).

6. Confrontation and Admission of Walenta Statements

R. Carr argues that admission of statements made by Walenta violated his Sixth Amendment right to confront the witnesses against him and requires reversal of his felony murder conviction.

All parties agree that our review of this constitutional question is unlimited. See *State v. Belone*, 295 Kan. 499, 502-03, 285 P.3d 378 (2012) (citing *State v. Bennington*, 293 Kan. 503, 507, 264 P.3d 440 [2011]; *State v. Marquis*, 292 Kan. 925, 928, 257 P.3d 775 [2011]; *State v. Leshay*, 289 Kan. 546, 547, 213 P.3d 1071 [2009]; *State v. Ransom*, 288 Kan. 697, 708-09, 207 P.3d 208 [2009]); see also *State* v. *Brown*, 285 Kan. 261, 282, 173 P.3d 612 (2007) (confrontation issues under both federal and state constitutions raise questions of law subject to unlimited appellate review).

All parties also agree that our analysis of the merits of this issue should be guided by *Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). *Crawford*, a 2004 United States Supreme Court decision on the Confrontation Clause, has superseded *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), which guided Judge Clark's rulings at the time of the defendants' trial.

Additional Factual and Procedural Background

During the several weeks that Walenta survived after she was shot, she made several statements about the crime and her attacker. Her initial statements were made to her neighbor Kelley, who came to Walenta's assistance within minutes of the shooting. Walenta also was interviewed by several law enforcement

investigators while in the hospital. One of the statements she gave to investigators included her tentative identification of R. Carr from a photo array. This conversation took place in the presence of Walenta's husband.

No representative of the defendants was able to question Walenta before she died.

R. Carr filed a pretrial motion in limine to exclude any statement Walenta made to Detective Randall Reynolds. At a hearing on the unsuccessful motion, counsel clearly based the objection to Reynolds' testimony on this subject on the federal Confrontation Clause.

At trial, neither R. Carr's counsel nor J. Carr's counsel objected to Kelley's testimony about Walenta's statements until after Kelley had testified that Walenta told her the person who shot her was a black man with wiry hair. At that point, the following exchange occurred:

> "[J. Carr's counsel]: Your Honor, at this time we're going to go ahead and make an objection based on hearsay. There was an argument in a previous pretrial motion in this regard and we would ask that it be a continuous objection to anything Miss Walenta said.
>
> "[R. Carr's counsel]: Join, Your Honor.
>
> "THE COURT: I'll overrule the objection, but I'll give you a continuing one to the line of testimony."

After the continuing objection was granted, Kelley also testified that Walenta had told her she was shot three times and that a light-colored car had followed her onto her street.

Wichita Police Officer Joshua Lewis and Detective James Whittredge testified about statements Walenta made to them. Lewis testified that, on December 11, Walenta described her attacker as a black male about 6 feet tall, approximately 30 years old, with long black hair. She also told Lewis and Whittredge that she had been followed by a light-colored four-door vehicle. Whittredge testified that Walenta told him she did not know the gunman and that he had not tried to rob her but had indicated he needed help. Walenta also told Whittredge that the gunman—a black male in his 30s, 5 feet 7 inches to 6 feet tall, with long straight wiry—hair disappeared very quickly after the shooting. Walenta associated the gunman with the light-colored four-door vehicle that had been following her.

Reynolds testified that he spoke with Walenta about the crime on December 13 and 15. Among other things, during the first interview, Walenta told Reynolds that the man who shot her got out of the passenger side of the vehicle and that he held his gun palm down. She also told Reynolds that the man ran immediately after he shot her, and, at the same time, she noticed that the car that had followed her started to pull away. She was unsure whether the shooter was left behind.

Reynolds testified that he returned to the hospital to show Walenta photo arrays containing pictures of R. Carr and J. Carr after their arrests on December 15. Walenta said that a photo of R. Carr in the second position and a photo of another individual in the first

position in one array fit her attacker's general appearance. But she said that the photo of R. Carr had eyes matching what she remembered. Reynolds had Walenta write this information on the photo array containing R. Carr's picture. Walenta could not select anyone who looked familiar from the array containing J. Carr's photo. Reynolds also testified that, after Walenta died, he asked her husband to help him decipher Walenta's handwritten notes on the photo array containing R. Carr's picture.

Defense counsel lodged several objections during the testimony of the three law enforcement officers about Walenta's statements. Judge Clark overruled all of the specific objections but twice granted additional continuing objections to such testimony.

Walenta's husband, Donald, testified that he was present during most of the law enforcement interviews with his wife, including the one in which Reynolds showed his wife the photo arrays. Donald heard the words his wife spoke to Reynolds and observed her write on the photo array. He did not actually see what she had written until Reynolds spoke to him after Walenta's death. Looking at the array while on the stand at trial, Donald testified that his wife wrote: "No. 1 and No. 2 represent the man who assaulted me. The general appearance of No. 1 fits the assailant but the eyes, eye set of No. 2 also represents what I remember." Neither defendant objected to Donald's testimony.

Preservation of the Confrontation Clause Issue for Appeal

Because the Walenta felony murder was not subject to the death penalty, we do not apply K.S.A. 21-6619(b), which requires us to overlook a preservation problem in the review and appeal from a judgment of conviction resulting in a sentence of death.

The State suggests that the defendants failed to preserve any Confrontation Clause issue on Walenta's statements for our review.

We agree with the State as to the part of Kelley's testimony that preceded Judge Clark's granting of a continuing objection. The defense objections to Kelley's testimony that Walenta told her a black man with wiry hair was the gunman came too late.

We disagree with the State that lack of preservation bars our consideration of the Confrontation Clause issue as to the three law enforcement witnesses. The record reflects multiple defense objections during their testimony, at least one referencing the Confrontation Clause objection raised pretrial and at least two leading to more continuing objections being granted by Judge Clark.

We agree with the State that there is a preservation problem with a Confrontation Clause issue on the testimony from Walenta's husband about what his wife said to and wrote for Reynolds in his presence. See K.S.A. 60-404 (contemporaneous objection rule); see also *State v. McCaslin*, 291 Kan. 697, 706, 245 P.3d 1030 (2011) (application of contemporaneous objection rule when Confrontation Clause objection not specific in district court).

It is true that we have made an exception to the general contemporaneous objection rule to consider Confrontation Clause arguments raised by defendants tried before *Crawford* was decided. See *State v. Brown*, 285 Kan. 261, 281, 173 P.3d 612 (2007) (citing *State v. Miller*, 284 Kan. 682, 709, 163 P.3d 267 [2007]). But doing so in this case would be inappropriate. Here, defense counsel repeatedly exhibited full awareness of the potential of a Confrontation Clause violation; they registered numerous objections to the testimony from Kelley and the law enforcement witnesses about what Walenta communicated to them. The total absence of a defense objection during Donald's testimony looks far more like strategy than ignorance.

Violation of Sixth Amendment

Crawford, 541 U.S. at 53-54, established that the Sixth Amendment Confrontation Clause prevents out-of-court statements that are testimonial in nature from being introduced against a criminal defendant unless the declarant is unavailable and the defendant has had a previous opportunity to cross-examine him or her.

> "The Confrontation Clause of the Sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.' In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), we held that this provision bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v.*

Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

This brings us to other points of agreement among the parties.

First, the State and the defendants agree that, under the standards set out by the United States Supreme Court in *Davis*, and by this court in *Brown*, 285 Kan. at 291, Walenta's statements presented through Kelley were not testimonial. They also agree that Walenta's statements to the three law enforcement officers—Lewis, Whittredge and Reynolds—were testimonial.

> "Statements made in the course of police interrogation are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

The State and the defendants also agree as a general matter that, despite the general *Crawford* rule, testimonial statements of an absent declarant who has never been cross-examined by the defense may be admitted under the doctrine of forfeiture by wrongdoing. The doctrine applies when the declarant's absence is attributable to wrongdoing by a defendant specifically intending to prevent the declarant from testifying. See *Giles v. California*, 554 U.S. 353, 388, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (in order to apply doctrine, State must prove by preponderance of evidence that defendant's wrongdoing specifically intended to prevent testimony); *State v. Belone*, 295

Kan. 499, 504, 285 P.3d 378 (2012) (district judge erred by admitting victim's testimonial statements to police when defendants' intent to prevent testimony not shown); *State v. Jones*, 287 Kan. 559, 567-68, 197 P.3d 815 (2008) (same).

That is the point at which the parties' agreement ends. The State invokes the doctrine to save the testimony from the three law enforcement officers, and the defense argues that the doctrine was inapplicable. We need not settle this dispute because we are persuaded that answering the question of whether any error on this issue was harmless is dispositive.

Harmlessness

Harmless error analysis applies to errors under *Crawford*. *Belone*, 295 Kan. at 504-05; see *Lilly v. Virginia*, 527 U.S. 116, 139-40, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) (Confrontation Clause violation subject to harmless error review). A Kansas court cannot declare an error implicating a right guaranteed by the United States Constitution harmless unless it is persuaded beyond a reasonable doubt that there was no impact on the trial's outcome, *i.e.*, that the error did not contribute to the verdict. *State v. Trujillo*, 296 Kan. 625, 631, 294 P.3d 281 (2013); *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967]), *cert. denied* 132 S. Ct. 1594 (2012). The State, as the party benefiting from any error here, bears the burden to establish that any Confrontation Clause error was harmless. *Ward*, 292 Kan. at 568-69.

The State can bear its burden here. The nontestimonial statements of Walenta to Kelley to

which she testified and the statements and actions of Walenta in her husband's presence to which he testified without objection make the law enforcement testimony harmless, because they covered much of the same ground. Walenta had told Kelley about the black man with wiry hair who shot her three times and about a light-colored car that followed her home, and Kelley passed this information on to the jury. Walenta's husband was able to tell the jury about what was probably Walenta's biggest contribution to the law enforcement investigation, her writing on the photo array containing R. Carr's picture. Reynolds' testimony about the composition of the photo array, including designation of R. Carr's picture as "No. 2" had been properly admitted without any violation of *Crawford*. These facts were not communicated by Walenta at all.

In contrast, the only items of evidence drawn from Walenta's statements that the three law enforcement witnesses may have added to the mix were her various and vague estimates of the perpetrator's height and age, the fact that he held his gun palm down, and the fact that he ran away as the light-colored car appeared to be leaving immediately after the shooting. The specific way the gun was held was the only directly incriminating item against R. Carr among these, because Schreiber testified that the first man who approached him held his gun in the same way. Walenta's age and height estimates were too vague to have much practical impact on the jury's consideration. And the description of the light-colored car's departure was no more significant, and probably less significant, than the circumstances of its arrival just behind Walenta's Yukon on her dead-end street, a fact about which Kelley had already testified. As to J. Carr, the

only other piece of incriminating information that came from one of the three officers was that the gunman exited the passenger side of the light-colored car. Like the car's departure, this tended to show the involvement of a second perpetrator. But the idea that two people participated in the Walenta incident was testified to without objection by a different law enforcement witness.

Under these circumstances, we deem any error in admitting Walenta's statements through the three law enforcement witnesses harmless beyond a reasonable doubt.

7. Sufficiency of Evidence on Walenta Felony Murder

R. Carr argues that his felony murder conviction for the killing of Walenta must be reversed because the State failed to present sufficient evidence of the underlying attempted aggravated robbery.

Additional Factual and Procedural Background

There were no eyewitnesses to Walenta's shooting who testified at trial. Walenta was alone when she was shot in the driver's seat of her Yukon in her driveway and died a few weeks later.

Several other witnesses were permitted to testify to what Walenta told them about the crime before she died. Their information included the following: Walenta noticed a light-colored car following her as she drove home. When she pulled into her driveway, she saw the car park. A black male got out of the passenger side of the car, approached the driver's side of her Yukon. Walenta said that the man did not try to rob her but

instead indicated that he needed help. When Walenta rolled down her window a few inches, the man immediately stuck a handgun into the opening, holding it palm down and pointing it at her head. When she turned the ignition, the Yukon's starter made a grinding sound because the car was already running. The man told her not to move the car. When she nevertheless shifted into reverse, the man shot her three times. Then he ran. Walenta saw the light-colored car begin to move away after the shots were fired, and it possibly left the gunman behind.

Evidence at trial also showed several common elements among the three incidents that gave rise to the charges against the defendants.

The gun used to shoot out one of Schreiber's tires, to shoot Walenta, and to shoot at least Aaron S. in the soccer field after the crimes at the Birchwood residence was the black Lorcin seen in the possession of J. Carr by Adams on the night of Walenta's shooting. A light-colored car followed Walenta home on the night she was shot, and a similar car followed a female next-door neighbor of the three friends who lived in the Birchwood triplex when she drove home alone shortly before the home invasion. The Schreiber and Birchwood incidents involved two black men, one of whom was identified by a victim as R. Carr. Walenta also picked R. Carr's picture out of a photo array as the person whose eyes most resembled those of her attacker. The Schreiber crime began with a man identified as R. Carr approaching Schreiber's driver's side window. Both Schreiber and four of the Birchwood victims were taken to ATMs to withdraw money from their bank accounts, and the perpetrators took other

property from them. All three incidents occurred within days of each other in the northeast part of Wichita: the Schreiber incident began on December 7; the Walenta incident occurred on December 11; the Birchwood crimes occurred on December 14 and 15.

During an instructions conference at the defendants' trial, the State requested an instruction telling jurors they could consider evidence related to the Schreiber and Birchwood incidents "for the limited additional purpose of determining the intent, identity, and motive of the defendant as alleged in the counts involving [Walenta] as an alleged victim." R. Carr's counsel objected to the instruction, and Judge Clark denied the State's request. The jury did receive an instruction telling it that each charged crime was a separate and distinct offense and that the jury "must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge." Judge Clark also informed the jury that, in order to find R. Carr guilty of felony murder, the State had to prove beyond a reasonable doubt that the killing of Walenta "was done while in the commission of or attempting to commit aggravated robbery."

Evaluation of Evidence

When the sufficiency of the evidence is challenged in a criminal case,

> "the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence,

> resolve evidentiary conflicts, or make witness credibility determinations. *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011)." *State v. Qualls*, 297 Kan. 61, 66, 298 P.3d 311 (2013).

A conviction for felony murder cannot stand without sufficient evidence of one of the enumerated inherently dangerous felonies listed in K.S.A. 21-3436. See *State v. Williams*, 229 Kan. 290, 300, 623 P.2d 1334 (1981). Sufficient evidence, even for the gravest of offenses, may consist entirely of circumstantial evidence. *State v. Ward*, 292 Kan. 541, Syl. ¶ 13 (2011).

R. Carr does not argue that we are prohibited from reviewing all evidence, including inadmissible evidence, to determine sufficiency of the evidence on his felony murder conviction. That we assumed error on the admissibility of law enforcement statements in the previous section is no barrier to consider those same statements here. See *State v. Jefferson*, 297 Kan. 1151, 1166, 310 P.3d 331 (2013) (reviewing court considers erroneously admitted evidence in reviewing sufficiency of evidence).

When the evidence of the Walenta felony murder is considered in isolation, we agree with R. Carr that it was insufficient to support his conviction of aggravated robbery or attempted aggravated robbery. There simply was nothing to support an inference that the man who shot Walenta took property or intended to take property from her. *Cf. State v. Calvin*, 279 Kan. 193, 200, 105 P.3d 710 (2005) (felony murder conviction affirmed based on underlying felony of attempted aggravated robbery; testimony offered indicating defendant intended to rob murder victim). The State's case was just as consistent with an intention to commit

other crimes—*e.g.*, aggravated assault, attempted rape or other sex crimes, attempted aggravated kidnapping.

But our agreement with R. Carr on this point does not entitle him to reversal.

We have recently decided in another case that jurors may consider evidence from a string of residential burglaries on the issue of whether one of the perpetrators of those burglaries was present and participating in yet another burglary in the string, one that ended in murder of the homeowner. See *McBroom*, 299 Kan. __, 325 P.3d 1174 (2014) (slip op. at 33-34).

Likewise, the jury in this case could consider evidence against R. Carr on the joined charges arising from the Schreiber and Birchwood crimes when deciding whether to find him guilty or not guilty on the Walenta felony murder. The Schreiber and Birchwood evidence did not qualify as suspect other crimes propensity evidence under K.S.A. 60-455 and did not require a limiting instruction. See *State v. Cromwell*, 253 Kan. 495, 509, 856 P.2d 1299 (1993). In addition, the instruction given on the jury's duty to consider each charge "separately on the evidence and law applicable to it, uninfluenced by [the jury's] decision as to any other charge" did not prevent jurors from considering all of the evidence admitted in this joint trial. Under *McBroom*, some of the evidence supporting the Schreiber and Birchwood charges also supported or was, in the words of the instruction, "applicable" to the Walenta charge.

With these rules established, the jury in this case was free to take into account that the three incidents giving rise to the charges against R. Carr were close

together in time. Both Schreiber and Holly G. identified R. Carr as one of their assailants, and Walenta selected R. Carr's picture from a photo array as the one in which the eyes most resembled her attacker. Ballistics testing showed that the gun used in all three incidents was the same. Schreiber described the man who approached him in the driver's seat of his car as holding that gun palm down, which was the same as Walenta's description of her attacker. The Schreiber and Birchwood crimes definitely involved two men, who committed multiple aggravated robberies, and the Walenta crime appeared to involve a confederate of the gunman who waited in the light-colored car that followed Walenta home. A light-colored car also made a similar pass on the street of the Birchwood triplex just before the home invasion and its aftermath. As with Walenta, the person driving the car had followed a female neighbor going home alone in the late evening.

Because all of this evidence could be considered in conjunction with Walenta's communicated recollections of the circumstances surrounding her shooting—and because this evidence included multiple aggravated robberies facilitated by similar perpetrators using similar tactics and the same gun—we reject R. Carr's challenge to the sufficiency of the evidence to convict him of Walenta's felony murder based on aggravated robbery. A rational factfinder could have found R. Carr guilty of this murder beyond a reasonable doubt.

8. Lesser Included Offense Instructions for Felony Murder

R. Carr did not request any lesser included offense instructions for felony murder at trial. During deliberations, the jury asked: "Can a lesser count be

considered for a defendant on [the Walenta killing]?" Judge Clark responded: "The answer is no."

Because R. Carr sought no lesser included offense instructions, we review his assertion that Judge Clark nevertheless should have given them for clear error. K.S.A. 22-3414(3); *State v. Briseno*, 299 Kan. __, 326 P.3d 1074 (2014); *State v. Williams*, 295 Kan. 506, Syl. ¶ 3, 286 P.3d 195 (2012).

> "To determine whether an instruction or a failure to give an instruction was clearly erroneous, the reviewing court must first determine whether there was any error at all. To make that determination, the appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record."
>
> "If the reviewing court determines that the district court erred in giving or failing to give a challenged instruction, then the clearly erroneous analysis moves to a reversibility inquiry, wherein the court assesses whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The party claiming a clearly erroneous instruction maintains the burden to establish the degree of prejudice necessary for reversal." *Williams*, 295 Kan. 506, Syl. ¶¶ 4-5.

Under K.S.A. 22-3414(3), a district judge must give lesser included offense instructions "where there is some evidence that would reasonably justify a conviction of some lesser included crime." At the time of the trial in this case, felony murder was excepted

from application of K.S.A. 22-3414(3) under a court-made rule. See *State v. Becker*, 290 Kan. 842, 856-57, 235 P.3d 424 (2010) (lesser included offense instructions need not be given in felony murder case unless evidence of underlying felony weak, inconclusive, conflicting).

In *State v. Berry*, 292 Kan. 493, Syl. ¶ 6, 254 P.3d 1276 (2011), this court abandoned the court-made exception to K.S.A. 22-3414(3). And we said that the holding of *Berry* would apply to all cases then pending on direct appeal, which would include this one. 292 Kan. at 514.

After *Berry* was decided, the legislature eliminated all lesser included offenses of felony murder. See L. 2012, ch. 157, sec. 2; see also K.S.A. 2012 Supp. 21-5109(b)(1).

In *State v. Wells*, 297 Kan. 741, Syl. ¶ 8, 305 P.3d 568 (2013), we examined the legislature's action and held that it "was not merely procedural or remedial but substantive," which meant the new legislation was not retroactive and would not cover this case.

The 2013 legislature acted again in reaction to *Wells*, making explicit its intention that the abolition of lesser included offenses of felony murder be retroactive. See L. 2013, ch. 96, sec. 2 (adding subsections [d], [e] to K.S.A. 2012 Supp. 21-5402; [d] reiterates abolition; [e] expresses retroactive intention).

In light of these legal developments, this court ordered the parties to submit supplemental briefing. They did so. Those supplemental briefs do not address the prerequisites that a lesser included offense instruction be factually and legally appropriate, and,

for purposes of argument, we assume that at least second-degree murder would have met those criteria under the *Berry* rule. The outcome on this issue then turns only on whether the 2013 statutory amendments eliminating lesser included offenses for felony murder apply in this case.

R. Carr argues that the amendments cannot apply without violation of the Ex Post Facto Clause. We have now decided this issue adversely to him in *State v. Todd*, 299 Kan. 263, Syl. ¶ 4, 323 P.3d 829 (2014), and do not revisit the rule or rationale of that case here.

R. Carr does not make an explicit due process argument to defeat application of the amended statutes eliminating lesser included offenses to felony murder. But he does assert that a defendant's theory that the State has overcharged and he or she should be convicted instead of a lesser included offense is a type of defense to the more serious charge. See *State v. Plummer*, 295 Kan. 156, 159, 168, 283 P.3d 202 (2012) (defendant's theory of defense on aggravated robbery commission of theft followed by scuffle with security guard trying to prevent escape of suspect; district judge erred in refusing to instruct on theft). And a criminal defendant's right to present a defense and have jury instructions supporting the defense given is based in due process principles. See *State v. McIver*, 257 Kan. 420, Syl. ¶ 1, 902 P.2d 982 (1995); *State v. Wade*, 45 Kan. App. 2d 128, 135, 245 P.3d 1083 (2010). Thus, to the extent R. Carr relies on due process, we dispose of that argument as well by observing that we have now decided this issue against his position. See *State v. Gleason*, No. 97,296, 299 Kan. ___, ___ P.3d ___ (filed July 18, 2014).

APPENDIX

14-449

No.

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

VOLUME 2 OF APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. McALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
stevermac@fastmail.fm
Counsel for Petitioner

October 2014

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

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9. Instruction, Multiplicity on Capital Murder

Defendant J. Carr argues in his separate appeal that faulty instructions on the K.S.A. 21-3439(a)(4) sex crime-based capital murders and a multiplicity problem on three of the four K.S.A. 21-3439(a)(6) multiple-death capital murders combined to require reversals. R. Carr makes the multiplicity argument. Because J. Carr and R. Carr were tried together on the same alternative charges and a single set of jury instructions, and because their jury completed identical verdict forms for the two defendants in exactly the same way, J. Carr's arguments on this combination of infirmities and its effect apply equally to R. Carr. Thus, although R. Carr made a less comprehensive argument on these problems, we address it in his case as well. See K.S.A. 2013 Supp. 21-6619(b) (court authorized to recognize, react to unassigned errors appearing in record on capital case "if the ends of justice would be served thereby").

We focus first on the jury instructions on sex crime-based capital murder and the wording of the verdict forms. Next this opinion addresses the multiplicity issue on three of the four capital murder convictions. Ultimately, we conclude that these errors require reversal of three of R. Carr's four capital murder convictions.

Additional Factual and Procedural Background

The amended complaint charged both defendants with capital murder in Counts 1 through 8. Each odd-numbered count among these eight was alternative to the even-numbered count following it.

The odd-numbered counts alleged capital murder of one person—Heather M., Aaron S., Brad H., or Jason B.—under K.S.A. 21-3439(a)(4), which prohibits premeditated murder of a victim of rape, criminal sodomy, or aggravated criminal sodomy in the commission of, subsequent to, or in the attempt of any of those three crimes.

The even-numbered counts alleged capital murder of all four victims of the quadruple homicide under K.S.A. 21-3439(a)(6), which prohibits the "premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct." Each count was drafted to accuse the defendants of killing one of the four victims in a transaction in which the three others also were killed. The only difference from one even-numbered count to the next was the position of the victims' names.

A single set of jury instructions on the alternative capital counts applied to both defendants, and the eight capital counts from the amended complaint were combined into four instructions labeled Counts "One (1)" through "Four (4)." The heading of each instruction named one of the quadruple homicide victims as its subject, but the text of the four instructions was exactly the same, with the exception of the shifting positions of the four victims' names on the multiple-homicide alternative.

For example, Instruction No. 12 on the capital murder of Heather M. read:

"INSTRUCTION NO. 12

"COUNT ONE (1)

"HEATHER [M.]

"Each defendant is charged in Count One with the crime of Capital Murder. Each defendant pleads not guilty to the charge.

"To establish this charge against an individual defendant, each of the following claims must be proved. Each must be proved beyond a reasonable doubt.

"1. That the defendant intentionally killed Heather [M.];

"2. That such killing was done with premeditation;

"3. (A.) That Heather [M.] was a victim of rape and/or aggravated criminal sodomy, and such killing was done in the commission of or subsequent to such rape and/or aggravated criminal sodomy;

"OR

"3. (B.) That the premeditated and intentional killing of Heather [M.] and the killing of Brad [H.], Jason [B.] and Aaron [S.] was [*sic*] a part of the same act or a part of two or more acts connected together or constituting parts of a common scheme or course of conduct;

"4. That this act occurred on or between the 14th day of December, 2000, and the 15th day of December, 2000, in Sedgwick County, Kansas.

"The elements of the crime of Rape are found in Instruction No. 37 and those of Aggravated Criminal Sodomy are found in Instruction No. 39."

Instruction number 37, incorporated into each of the four instructions on the elements of capital murder, read:

"INSTRUCTION NO. 37

"COUNT SEVENTEEN (17)

"H.G.

"Each defendant is charged in Count Seventeen with the crime of Rape. Each defendant pleads not guilty.

"To establish this charge against an individual defendant, the following elements must be proved. Each must be proved beyond a reasonable doubt.

"1. That the defendant caused H.G. to commit an act of sexual intercourse with Heather [M.];

"2. That the act of sexual intercourse was committed without the consent of H.G. under circumstances where she was overcome by force or fear; and

"3. That this act occurred on or between the 14th day of December, 2000, and the 15th day of December, 2000, in Sedgwick County, Kansas.

"Sexual intercourse means any penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however

slight, is sufficient to constitute sexual intercourse."

Instruction 39, also incorporated into each of the instructions on the elements of capital murder, read:

"INSTRUCTION 39

"COUNT NINETEEN (19)

"H.G.

"Each defendant is charged in Count Nineteen with the crime of Aggravated Criminal Sodomy. Each defendant pleads not guilty.

"To establish this charge against an individual defendant, the following elements must be proved. Each must be proved beyond a reasonable doubt.

"1. That the defendant caused H.G. to engage in sodomy with Heather [M.];

"2. That the act of sodomy was committed without the consent of H.G. under circumstances where she was overcome by force or fear; and

"3. That this act occurred on or between the 14th day of December, 2000, and the 15th day of December, 2000, in Sedgwick County, Kansas.

"Sodomy means oral contact or oral penetration of the female genitalia or oral contact of the male genitalia or anal penetration, however slight, of a male or female by any body part or any object."

In other words, the four jury instructions on the elements of sex crime-based capital murder—whether the victim named in the heading was Heather M., Aaron S., Brad H., or Jason B.—directed jurors to Instructions 37 and 39 for the elements of the crimes capable of supporting convictions of the defendants for capital murder under K.S.A. 21-3439(a)(4). And Instructions 37 and 39 were the elements instructions for rape and aggravated sodomy of Holly G., and *not* of any of the four homicide victims.

Instruction No. 72, the jury's final instruction, said that its "agreement on a verdict must be unanimous."

The verdict forms for each defendant also combined the alternative counts from the amended complaint into four counts and were identically worded from count to count and from defendant to defendant, with the exception of their headings and the shifting positions of the four victims' names on the multiple-homicide alternative.

For example, the verdict form for R. Carr for Count 1, the capital murder of Heather M., read:

> "We, the jury, being duly sworn upon our oath make the following findings concerning the crimes charged against the defendant Reginald D. Carr, Jr.:
>
> "COUNT ONE (1)
>
> "CAPITAL MURDER
>
> "HEATHER [M.]
>
> "1. ___ Guilty of the Capital Murder of Heather [M.]

"Please circle the letter (A. and/or B.) in front of each statement that you find has been proved by the evidence:

A. We find that the evidence proves that Heather [M.] was a victim of rape and/or aggravated criminal sodomy and she was killed in the commission of or subsequent to such rape and/or aggravated criminal sodomy.

B. We find that the evidence proves that the premeditated and intentional killing of Heather [M.] and the killing of Brad [H.], Jason [B.] and Aaron [S.] was [*sic*] a part of the same act or a part of two or more acts connected together or constituting parts of a common scheme or course of conduct.

OR

(FIRST LESSER INCLUDED OFFENSE)

"2. ___Guilty of the First Degree Murder of Heather [M.]

OR

(SECOND LESSER INCLUDED OFFENSE)

"3. ___ Guilty of the Second Degree Murder of Heather [M.]

OR

"4. ___Not guilty of Count One (1)

The jury found both defendants guilty on all four counts of capital murder. On each of the four verdict forms for both defendants, the jury circled both the A and B options.

The Legal Framework and the Parties' Arguments

The defense arguments on this issue have their genesis in a rule recognized by the United States Supreme Court in 1931 in *Stromberg v. People of State of California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931).

In that case, the defendant was charged with displaying a red flag in violation of a statute that prohibited the display "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character." 283 U.S. at 361. The instructions charged the jury in the language of the statute, and jurors were told they could find the defendant guilty if she had displayed the flag for any of the three listed purposes. The jury returned a general verdict of guilty. 283 U.S. at 361, 363, 367-68.

The state appellate court, while doubting the constitutionality of the statute's prohibition of a display "as a sign, symbol or emblem of opposition to organized government," nevertheless upheld the defendant's conviction because it believed the rest of the statute to be constitutional. 283 U.S. at 361.

The United States Supreme Court rejected the state appellate court's reasoning, saying:

> "We are unable to agree with this disposition of the case. The verdict against the appellant

> was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the [jurors were] instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." 283 U.S. at 367-68.

Stromberg was followed by two other United States Supreme Court cases relevant here.

In *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), *overruled on other grounds Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), the Supreme Court applied the logic of *Stromberg* to a case in which neither of the two ways in which the jury could have arrived at conviction was constitutionally inadequate, but one of them was barred by the statute of limitations. "In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not

on another, and it is impossible to tell which ground the jury selected." *Yates*, 354 U.S. at 312 (citing *Stromberg*, 283 U.S. at 367-68); *Cramer v. United States*, 325 U.S. 1, 36, 65 S. Ct. 918, 89 L. Ed. 1441 [1945]); *Williams v. State of North Carolina*, 317 U.S. 287, 291-92, 63 S. Ct. 207, 87 L. Ed. 279 [1942]).

In the other case, *Griffin v. United States*, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), the Court addressed a situation in which an absence of proof, rather than legal insufficiency, was at issue. The Court left the holdings of both *Stromberg* and *Yates* intact. See *Hedgpeth v. Pulido*, 555 U.S. 57, 58, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008) ("A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one.") (citing *Stromberg*, 283 U.S. 359; *Yates*, 354 U.S. 298).

Acknowledging that "a host of our decisions" before and after *Yates* had applied "'the rule of the *Stromberg* case to general-verdict convictions that may have rested on an unconstitutional ground," the Court recognized that *Yates* extended the holding of *Stromberg* to a new situation, one in which a possible basis of a general verdict "did not violate any provision of the Constitution but was simply legally inadequate." *Griffin*, 502 U.S. at 55.

Griffin did not do likewise when the problem with a possible avenue to conviction was factual rather than legal. 502 U.S. at 59 (citing *Duncan v. Louisiana*, 391 U.S. 145, 157, 88 S. Ct. 1444, 20 L. Ed. 2d 491 [1968]).

Our Kansas precedent demonstrates at least some inclination to embrace the general rationale and result

of *Stromberg*, as extended by *Yates*. See *State v. Kunellis*, 276 Kan. 461, 78 P.3d 776 (2003) (when verdict shows jury specifically rejected legally sound theory in favor of what court deems legally unsound theory, conviction must be reversed).

Several federal circuit courts and other state courts follow *Stromberg* and *Yates*. See *United States v. Lawson*, 677 F.3d 629, 655 (4th Cir. 2012), *cert. denied* 133 S. Ct. 393 (2012) (*Yates* requires reversal when case submitted to jury on two or more theories, one theory legally inadequate; general verdict cannot rule out jury reliance on inadequate theory); *United States v. Howard*, 517 F.3d 731 736-37, (5th Cir. 2008) (same); *People v. Morgan*, 42 Cal. 4th 593, 612-13, 170 P.3d 129 (2007) (prosecutor's argument on one legally adequate, one legally inadequate theory requires reversal when instructions did not guide jury; impossible to determine which theory formed basis of verdict); *Fitzpatrick v. State*, 859 So. 2d 486, 491 (Fla. 2003) (conviction resting on general jury verdict that may have been based on legally insufficient theory cannot be sustained); *Robinson v. State*, 266 S.W.3d 8, 14 (Tex. App. 2008) *petition for discretionary review refused* (Feb 25, 2009) (jury's option to convict on legally defective theory egregious error in capital murder case).

In *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), the United States Supreme Court recognized two rules that could be taken from *Stromberg*:

> "One rule derived from the *Stromberg* case requires that a general verdict must be set aside if the jury was instructed that it could rely on

> any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.
>
> "The second rule derived from the *Stromberg* case made clear that the reasoning of *Stromberg* encompasses a situation in which the general verdict on a single-count indictment or information rested on *both* a constitutional and an unconstitutional ground." 462 U.S. at 881-82.

The defense argument is that all four of the capital murder convictions must be reversed; one conviction, because it rested on both a legally adequate and legally inadequate ground, and three convictions, because they rested on two legally inadequate grounds. The State argues that the jury unanimously found the defendants guilty on each ground and that at least one ground was valid for each conviction, preserving all four verdicts.

Our overview of the legal framework and the parties' arguments brings us to the question of whether either or both of the capital murder theories pursued by the State was legally inadequate. As stated, we first focus on the instructions given for the sex crime-based K.S.A. 21-3439(a)(4) capital murder alternative.

K.S.A. 21-3439(a)(4) Instructions Evaluation

Neither defendant objected to the K.S.A. 21-3439(a)(4) instructions. Our review is therefore governed by K.S.A. 22-3414(3): "No party may assign as error the giving or failure to give an instruction unless the party objects thereto unless the instruction or the failure to give an instruction is clearly erroneous." See *State v. Kleypas*, 272 Kan. 894,

939, 40 P.3d 139 (2001) (clearly erroneous standard applies in death penalty cases).

We have recently expanded on exactly what "clearly erroneous" means.

In *State v. Williams*, 295 Kan. 506, 286 P.3d 195 (2012), we said that the phrase serves as both a conditional grant of reviewability when the instruction issue was not preserved below and as a standard of reversibility if error in the instruction is identified. 295 Kan. at 515. We deal here with reviewability, which is not only provided for by K.S.A. 22-3414(3) itself; it is also provided for by K.S.A. 2013 Supp. 21-6619(b) for death penalty cases. Under *Williams*, once reviewability is resolved, we determine de novo whether there was any error in the instructions. To make that determination, we "'consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record.'" *State v. Herbel*, 296 Kan. 1101, 1121, 299 P.3d 292 (2013) (quoting *Williams*, 295 Kan. 506, Syl. ¶ 4).

As we explained the concept of "legally and factually appropriate" in *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012):

> "[A]n instruction must always fairly and accurately state the applicable law, and an instruction that does not do so would be legally infirm .
>
> "Next, even if the instruction is legally appropriate when viewed in isolation, it must be supported by the particular facts of the case at bar."

Under *Williams*, the burden to show error is always on the complaining party, in this case, the defendants.

The defense characterizes the portions of the capital murder instructions focused on K.S.A. 21-3439(a)(4) as legally inappropriate because they failed to state the elements required to prove the offense and thus violated the defendants' rights under the Sixth and Fourteenth Amendments to the United States Constitution. In particular, J. Carr argues in his brief:

> "[B]ecause a conviction of capital murder under K.S.A. 2l-3439(a)(4) is dependent upon elements of a specific sex offense against the particular victim killed—indeed, it is the commission of the sex offense which elevates the intentional and premeditated killing of a particular person from ordinary premeditated first-degree murder to capital murder—the elements pertaining to the underlying sex offense are essential elements of the crime of capital murder that must be submitted to a jury and found unanimously beyond a reasonable doubt as required under the Sixth and Fourteenth Amendments to the United States Constitution. *See Apprendi* v. *New Jersey,* 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) (Sixth Amendment requires that finding of fact which increases the maximum sentence be found by a jury beyond a reasonable doubt); *Ring* v. *Arizona,* 536 U.S. 584, 153 L. Ed. 2d 556,122 S. Ct. 2428 (2002) (Sixth Amendment right to jury trial extends to finding of fact necessary to impose death penalty), *overruling Walton* v. *Arizona,* 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047(1990). *See also Schad* v.

> *Arizona*, 501 U.S. 624, 637-643, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991) (when legislature's definition of offense specifies facts which are 'necessary to constitute the crime,' due process and fundamental fairness, and the rationality that is a component of fundamental fairness, require that such facts be found by the jury beyond a reasonable doubt) (quoting *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) . .). Consequently, when the jury is instructed on the elements of a capital murder charge under K.S.A. 2l-3439(a)(4), the instruction must specify and set forth the elements of the underlying sex offense on which the conviction of capital murder depends." *State v. Carr*, No. 90,198, Brief of Appellant, 90-91.

This argument is correct. The portions of the capital murder instructions focused on K.S.A. 21-3439(a)(4) incorporated the elements from two other instructions, 37 and 39, that attempted to describe sex offenses against Holly G. rather than the victim of the murder. Although Judge Clark used the then-current PIK instruction on capital murder, he apparently did not fully grasp the import of the comments to that instruction, which included: "When defendant is charged with a capital murder done in the commission of or subsequent to another offense, the elements of the other offense should be set out in a separate instruction." PIK Crim. 3d 56.00-A (2002 Supp.). Instead, Judge Clark directed the jury to instructions that, although they were separate, dealt with crimes against a victim other than those who were the victims of the capital crimes. We note that the PIK Committee has now made the error committed here more obvious

by placing the elements of the underlying offense against a capital murder victim in the capital murder instruction itself. See PIK Crim. 4th 54.020.

Numerous cases of this court have held that "[w]hen a statute makes the commission of a crime or the intent to commit a crime an element of another crime, the jury instructions must set out the statutory elements of the underlying offense." *State v. Richardson*, 290 Kan. 176, 182, 224 P.3d 553 (2010) (instructions should have identified, defined moving violations forming basis for charge of felony fleeing, attempting to elude police officer) (citing *State v. Rush*, 255 Kan. 672, 679, 877 P.2d 386 [1994] [when judge instructed on burglary, element of defendant knowingly entering building "with intent to commit a theft therein" mentioned; yet instruction failed to instruct jury completely on elements of theft]); *State v. Linn*, 251 Kan. 797, 801-02, 840 P.2d 1133 [1992] *superseded by statute on other grounds State v. Hedges*, 269 Kan. 895, 8 P.3d 1259 [2000] [aggravated burglary instruction must set out elements of offense intended by accused when making unauthorized entry]); see *State v. Rivera*, 48 Kan. App. 2d 417, 446-47, 291 P.3d 512 (2012) (defendant charged with involuntary manslaughter, endangering child; although elements of endangering child set out in instruction for that charge, error to omit them in instruction on involuntary manslaughter).

The disconnect between the K.S.A. 21-3439(a)(4) language in the capital murder instructions and the incorporated language in Instructions 37 and 39 on rape and aggravated criminal sodomy means that those portions of the capital murder instructions were incorrect statements of the governing law. Because a

complete and accurate listing of the elements of the charged offense is fairly described as one of the most basic requirements of criminal jury instructions, one of the indispensable building blocks of any resulting conviction, see *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), under *Williams*, the instructions were legally inappropriate; under *Stromberg* and *Yates*, they were legally inadequate. See *Griffin,* 502 U.S. at 55. For our purposes, we need not consider whether the instructions also were factually inappropriate.

Were we reviewing these instructions in isolation under *Williams*, we would next move to the reversibility under the "clearly erroneous" rubric. See *Williams*, 295 Kan. at 516. Under *Stromberg*, however, the next question is whether the other theory available to the jury was legally adequate. Consequently we turn to the alternatives based upon multiple homicides under K.S.A. 21-3439(a)(6) to determine whether they provided the jury a legally adequate alternative on which to base the capital convictions.

K.S.A. 21-3439(a)(6) Multiplicity Evaluation

R. Carr challenges three of his four capital murder convictions, to the extent they were based on the multiple-homicide theory of K.S.A. 21-3439(a)(6), as multiplicitous.

"When an appellate court reviews a ruling on a double jeopardy or multiplicity issue, an unlimited scope of appellate review applies. *State v. Thompson,* 287 Kan. 238, 243, 200 P.3d 22 (2009); *State v. Harris,* 284 Kan. 560, Syl. ¶ 3, 162 P.3d 28 (2007)." *State v. Appleby*, 289 Kan. 1017, 1026, 221 P.3d 525 (2009).

Such a claim raises a question of law. *State v. Scott*, 286 Kan. 54, 65, 183 P.3d 801 (2008) (quoting *Harris*, 284 Kan. 560, Syl. ¶ 3).

Multiplicity is the charging of a single offense in more than one count of a complaint or information. It creates the potential for multiple punishments for a single crime, offending the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights. *State v. Scott*, 286 Kan. at 65 (quoting *Harris*, 284 Kan. 560, Syl. ¶ 1).

Although neither defendant objected at trial to the State pursuing multiple capital murder convictions under K.S.A. 21-3439(a)(6), their multiplicity claim can be considered for the first time on appeal in order to serve the ends of justice and prevent a denial of fundamental rights. *Harris*, 284 Kan. at 569; *State v. Nguyen*, 285 Kan. 418, 433, 172 P.3d 1165 (2007) (addressing multiplicity claim for first time on appeal because it implicates fundamental right not to be placed in jeopardy twice for same offense). In addition, K.S.A. 2013 Supp. 21-6619(b) requires us to "consider any errors asserted" in a death penalty case.

All four capital convictions against the defendants rest, at least in part, on a jury finding that each defendant intentionally and with premeditation killed more than one person under K.S.A. 21-3439(a)(6). The State concedes that only one capital conviction under this statutory subsection can stand, and that the three others, to the extent they rest on that theory, are multiplicitous. See *Harris*, 284 Kan. at 571-78 (unit of prosecution under K.S.A. 21-3439[a][6] is more than one killing; more than one victim required to have

prosecutable offense; killing of second, subsequent victim makes murder of group of victims punishable by death).

Under the language of the amended complaint and the jury instructions in this case, in order to avoid double jeopardy under the federal and state constitutions, R. Carr could be convicted and punished for only one count of capital murder under K.S.A. 21-3439(a)(6) for the killing of all four victims. The jury's reliance on 21-3439(a)(6) to undergird his three other capital convictions was, therefore, legally inadequate under *Stromberg* and *Yates*.

We turn next to whether any of the capital convictions may yet stand because the constitutional error identified in *Stromberg* and *Yates* can be deemed harmless. See *Hedgpeth v. Pulido*, 555 U.S. 57, 60-61, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008) (*Stromberg, Yates* predated United States Supreme Court's recognition in *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967], of harmlessness of some constitutional error; error not structural, subject to harmless error test).

Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. The issue is not whether the jury would have reached a different verdict but rather whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24.

We begin by recalling that *Zant*, 462 U.S. at 881-82, identified two possible errors derived from

Stromberg—one being that the jury *may* have chosen to base a conviction on a legally inadequate ground rather than the otherwise legally adequate grounds permitted in the instructions, and one being that a jury *did* rely on both an adequate and inadequate ground.

The jury had the option under Section 1 on Guilt of Capital Murder to circle A "and/or" B on the forms, indicating its finding that the State had proved both or just one theory of capital murder. Option A was sex crime-based capital murder under K.S.A. 21-3439(a)(4), and Option B was multiple-homicide capital murder under K.S.A. 21-3439(a)(6). The jury circled both options for each of the four victims.

On three of four of the capital verdict forms, because of the "and/or" between A and B on the verdict forms submitted to the jury, it was permitted to find guilt by selecting a legally inadequate ground under the K.S.A. 21-3439(a)(4) instructions or a legally inadequate ground on the K.S.A. 21-3439(a)(6) multiplicitous charges. Because the jury circled both A and B, we know that the jury's four guilty verdicts on capital murder counts actually were based on both subsections of the statute. This resembles the second type of *Stromberg* error, because we know the jury relied on a legally inadequate ground. And since there was no legally adequate ground presented on three of those charges, we conclude that three of the four capital convictions must be reversed.

On R. Carr's remaining capital conviction, we are convinced that reversal is unnecessary under *Chapman*'s harmless error standard.

We have two reasons for this holding.

First is the last line of the jury instructions given by Judge Clark: "Your agreement upon a verdict must be unanimous." When this sentence is read in conjunction with the "and/or" language on the verdict forms, we believe the most sensible and by far most likely construction is that neither A nor B could be circled if jurors did not unanimously vote for guilt on the individual theory following that letter designation. There is nothing in the instructions or verdict form indicating that jurors were told or would have understood that they were free to cobble together theories to get 12 votes for guilt. This means that one of the jury's unanimous verdicts on the K.S.A. 21-3439(a)(6) multiple-homicide theory was not polluted by either instruction error or multiplicity. This convinces us beyond a reasonable doubt that the instructional error on the sex-crime alternative for this count did not contribute to the verdict obtained on the valid multiple-homicide alternative.

Second is the nature of the evidence on the capital murders. There was no possible dispute that four persons were shot and killed in the early morning of December 15, 2000, while kneeling side by side in the snow. The essence of R. Carr's defense was that Holly G.'s identification of him was mistaken and that he was not one of the two men who participated in these shootings or the crimes that preceded them. He did not, and could not, credibly assert that only Heather M. or only Aaron S. or only Brad H. or only Jason B. died. This reinforces our decision to affirm one of the K.S.A. 21-3439(a)(6) convictions. That subsection of the statute focuses on multiple homicides; it is the fact that more than one person is killed that elevates the crime from premeditated first-degree murder to a

death-eligible crime. The jury in this case, indeed, no jury who heard the same evidence as that put on in this case, could have concluded this was not a multiple-homicide situation. There was nothing about the instructions or verdict forms used here that could have altered that reality.

We are left with the task of specifying, for procedure's sake, the conviction that will be upheld. We note in doing so that the manner in which the State charged the multiple murder counts ties each charge to a particular victim when, in fact, it was the murder of all four victims that is punishable by death. Because the charge alleging the capital murder of Heather M. was the first in the amended complaint, the jury instructions, and the verdict forms, we choose that conviction to uphold. In doing so, we wish to make clear that we are upholding R. Carr's capital conviction for the murder of all four of the victims.

10. Special Unanimity Instruction on Capital Murder

R. Carr asserts on appeal that the jury should have been given a special unanimity instruction on alternative capital murder charges based on K.S.A. 21-3439(a)(4) because jurors may not have understood that they needed to be unanimous on the sex crime underlying each capital murder charge under this subsection.

R. Carr's argument reflects a misunderstanding of the difference between a multiple acts issue and an alternative means issue. They differ in critical ways. See *State v. Becker*, 290 Kan. 842, 854-55, 235 P.3d 424 (2010).

At most, if more than one possible sex crime underlay each capital murder charge based on K.S.A. 21-3439(a)(4), that would set up the possibility of an alternative means issue, requiring the State to put on sufficient evidence of each sex crime as a means of committing the one capital murder charged. See *State v. Brown*, 295 Kan. 181, 196-97, 284 P.3d 977 (2012).

If more than one possible sex crime underlay each capital murder charge based on K.S.A. 21-3439(a)(4), that would not set up a multiple acts issue requiring a special unanimity instruction or an election by the prosecution. See *State v. Ultreras*, 296 Kan. 828, 854-55, 295 P.3d 1020 (2013); *State v. Voyles*, 284 Kan. 239, Syl. ¶ 2, 160 P.3d 794 (2007). There was a single offense committed for each of the alternative K.S.A. 21-3439(a)(4) capital murders charged in this case, *i.e.*, the killing of each of the four victims of the quadruple homicide.

Having made these preliminary comments, we decline to further discuss the merits of this issue because it is moot. See *State v. Dominguez*, 299 Kan. 567, 593, ___ P.3d ___ (2014) (appellate courts do not generally decide moot questions). We have already ruled that instructions on the K.S.A. 21-3439(a)(4) alternative capital murder charges were legally unsound and, to the extent R. Carr's s four capital convictions rested upon them, they have to be reversed.

11. Sex Offenses as Lesser Included Offenses of Capital Murder

R. Carr argues that his convictions for certain sex offenses must be reversed because the sex offenses constitute lesser included offenses of capital murder

under K.S.A. 21-3439(a)(4). Because we have decided that all of the capital convictions, to the extent they rested upon this subsection of the statute, must be reversed because of fatal instruction error, we need not reach this lesser included offenses argument. It is moot, and appellate courts do not generally decide moot questions. See *Dominguez*, 299 Kan. at 593.

12. Sufficiency of Evidence of Aggravated Burglary

J. Carr has challenged the sufficiency of evidence to prove aggravated burglary of the Birchwood home in his separate appeal. We treat this issue as potential unassigned error in this appeal on behalf of R. Carr. See K.S.A. 2013 Supp. 21-6619(b). Because the defendants were tried together on the same evidence in support of the same complaint and under the same jury instructions, the legal arguments made on behalf of one defendant on this issue apply equally to the other. Under K.S.A. 2013 Supp. 21-6619(b), which permits us to notice unassigned error in a capital case, we take up all defense arguments in this opinion on the Birchwood crimes, regardless of whether any individual argument was raised first by R. Carr or by J. Carr.

Our standard of review on sufficiency of the evidence is whether, after reviewing all the evidence in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Lopez*, 299 Kan. 324, 328, 323 P.3d 1260 (2014) (citing *State v. Harris*, 297 Kan. 1076, 1081, 306 P.3d 282 [2013], and *State v. Qualls*, 297 Kan. 61, Syl. ¶ 1, 298 P.3d 311 [2013]).

Aggravated burglary requires entering into or remaining within any occupied structure without authority and with intent to commit a felony therein. See K.S.A. 21-3716. The defense argues that there was no evidence in this case that the defendants entered into or remained within the Birchwood home without authority.

We disagree. Even the most serious crime can be proved by circumstantial evidence. See *Lopez*, 299 Kan. at 332 (citing *State v. Doyle*, 272 Kan. 1157, 1162, 38 P.3d 650 [2002]). And, here, there was abundant evidence, albeit circumstantial, that the defendants entered into and remained within the home without authority.

Although Holly G. did not see the defendants enter the house from the outdoors, she testified that Jason B. had locked up and turned out the front porch light, that he and she had retired to his bedroom for the night, and that the porch light came back on and she heard Aaron S.'s voice and another voice she did not recognize. Right away, she said, the door to Jason B.'s bedroom burst open and the defendants, both holding guns, entered. One of them ripped the covers off the bed. The other brought Aaron S. into the room, holding him by the back of his shirt, and threw him onto the bed. Both defendants started shouting questions and orders. Brad H. had to be brought in from his bedroom in the basement of the home. Heather M. had to be brought in from Aaron S.'s bedroom. This testimony certainly supported an inference that any other visitor was unexpected and unwelcome.

It is true that Holly G. did not testify that any of the Birchwood victims ever demanded or requested that

the defendants leave the home, but the absence of such an explicit demand or request, given the guns that the defendants persisted in waving around and their intermittent oral threats, cannot be equated with permission for their continued presence in the home.

The cases cited by the defense are distinguishable and unconvincing. See *State* v. *Hall,* 270 Kan. 194, 14 P.3d 404 (2000); *State* v.*Gutierrez,* 285 Kan. 332, 172 P.3d 18 (2007). They deal with situations in which defendants entered structures when they clearly had permission to do so and the issue was whether permission was withdrawn. The evidence before the jury in this case, viewed in the light most favorable to the State, supported a reasonable inference that Aaron S. responded to a knock at the front door and was met by two armed men who immediately threatened him with guns and entered without consent, taking him captive as they did so. It also supports the inference that the armed men remained in the home without permission, but only by terrorizing Holly G. and the four other victims.

This issue is without merit.

13. COERCED VICTIM-ON-VICTIM ACTS

Under assorted issue headings in their briefs to this court, the defendants have argued that there are three types of infirmities in their rape and attempted rape convictions on charges in which the defendants are alleged to have forced one of the Birchwood victims to engage in a sex act with another victim, *i.e.*, "victim-on-victim" acts. The three types are: charging deficiency in the amended complaint; jury instruction

error that mimicked the charging deficiency; and insufficiency of evidence.

Additional Factual and Procedural Background

The victim-on-victim rape and attempted rape counts as charged by the State in the amended complaint were: Count 25 for rape of Holly G. for her coerced digital penetration of Heather M.; Count 26 for rape of Heather M. for her coerced digital penetration of Holly G.; Count 29 for rape of Holly G. for her coerced sexual intercourse with Brad H.; Count 30 for rape of Brad H. for his coerced sexual intercourse with Holly G.; Count 31 for rape of Holly G. for her coerced sexual intercourse with Jason B.; Count 32 for rape of Jason B. for his coerced sexual intercourse with Holly G.; Count 33 for rape of Holly G. for her coerced sexual intercourse with Aaron S.; Count 34 for rape of Aaron S. for his coerced sexual intercourse with Holly G.; Count 35 for attempted rape of Aaron S. for his coerced attempted sexual intercourse with Heather M.; Count 36 for attempted rape of Heather M. for her coerced attempted sexual intercourse with Aaron S.; Count 37 for attempted rape of Jason B. for his coerced attempted sexual intercourse with Heather M.; Count 38 for attempted rape of Heather M. for her coerced attempted sexual intercourse with Jason B.; Count 39 for attempted rape of Brad H. for his coerced attempted sexual intercourse with Heather M.; and Count 40 for attempted rape of Heather M. for her coerced attempted sexual intercourse with Brad H. Count 41 for rape of Holly G. based on her coerced digital penetration of herself will be addressed separately below.

The language of each of the rape counts for victim-on-victim sex acts followed an identical pattern, typified by the first among them, Count 25:

> "[O]n or between the 14th day of December, 2000, A.D., and the 15th day of December, 2000, A.D., in the County of Sedgwick, State of Kansas, one REGINALD D. CARR a/k/a REGGIE CARR and JONATHAN D. CARR a/k/a JONATHAN HARDING did then and there unlawfully, cause H[olly] G. to commit an act of sexual intercourse by digital penetration of the vagina of Heather [M.] while H[olly] G. did not consent to the sexual intercourse when H[olly] G. was overcome by force or fear;
>
> ***"Contrary to Kansas Statutes Annotated 21-3502(1)(a), Rape . . ."***

In other words, the amended complaint accused the defendants of causing one of the five persons at the Birchwood home to engage in sexual intercourse with another of the persons at the Birchwood home, when the person caused to engage in the act did not consent and was overcome by force or fear.

The attempted rape counts contained the same causation language and allocated the roles among the participants in the same way. But, instead of alleging sexual intercourse, they alleged an overt act toward commission of sexual intercourse.

None of the victim-on-victim charges of rape or attempted rape stated that the second Birchwood participant did not consent or was overcome by force or fear.

Before trial, R. Carr moved to dismiss the victim-on-victim charges for rape and attempted rape, alleging that the complaint failed to allege criminal conduct under Kansas' rape statute. According to R. Carr, Kansas' rape statute did not criminalize the act of forcing two nonconsenting persons to engage in sexual intercourse. The district court denied the motion, saying, "'[H]e who acts through another acts himself.'"

The trial evidence in support of each of the victim-on-victim rapes and attempted rapes came from Holly G.'s description of the events at the Birchwood home. This evidence did not differentiate between the defendants or parse their individual contributions to the causation described in the amended complaint.

Each of the judge's instructions for the victim-on-victim sex crimes also followed an identical pattern, typified by the first among them, Instruction No. 37, on which Holly G. was the designated victim:

> "Each defendant is charged in [Count 25] with the crime of Rape. Each defendant pleads not guilty.
>
> "To establish this charge against an individual defendant, the following elements must be proved. Each must be proved beyond a reasonable doubt.
>
> 1. That the defendant caused H[olly]G. to commit an act of sexual intercourse with Heather [M.];
>
> 2. That the act of sexual intercourse was committed without the consent of H[olly]G.

> under circumstances where she was overcome by force or fear; and "

Again, none of the instructions for the victim-on-victim sex crimes stated that the second participant in the completed or attempted rape did not consent or was overcome by force or fear. The person designated as the victim in each instruction was the person caused to engage in the criminal act perpetrated upon his or her friend.

In addition, Instruction No. 8 informed the jury that:

> "A person who, either before or during its commission, intentionally aids, abets, advises, or counsels another to commit a crime with intent to promote or assist in its commission is criminally responsible for the crime committed regardless of the extent of the person's participation, if any, in the actual commission of the crime.
>
> "A person who, either before or during its commission, intentionally counsels, procures or uses force or the threat of force to compel another to commit a crime is responsible for the crime although the other who directly committed the act constituting the crime lacked criminal or legal capacity."

The verdict forms for each of these crimes simply gave the jury the option of choosing guilty or not guilty of the crime against the victim designated in the relevant instruction.

The Standard of Review and the Controlling Statutes

Resolution of this issue requires us to interpret the rape, aggravated criminal sodomy, attempt, and criminal liability statutes; and interpretation of a statute raises a question of law subject to unlimited review on appeal. See *State v. Johnson*, 297 Kan. 210, 215, 301 P.3d 287 (2013).

In addition,

> "'[i]t has long been the rule in Kansas that all crimes are established by legislative act. There are no common law crimes in the state, and there can be no conviction except for such crimes as are defined by statute. *State v. Young*, 55 Kan. 349, 356, 40 P 659 (1895).'
>
> "'It is also the rule in this state that a criminal statute will not be "extended by courts to embrace acts or conduct not clearly included within its prohibitions." *State v. Doyen*, 224 Kan. 482, 488, 580 P.2d 1351 (1978).'" *State v. Stewart*, 281 Kan. 594, 598, 133 P.3d 11 (2006) (quoting *State v. Sexton*, 232 Kan. 539, 542-43, 657 P.2d 43 [1983]).

K.S.A. 21-3502 sets out the elements of rape. Its subsection (a)(1)(A) defines the crime as "[s]exual intercourse with a person who does not consent to the sexual intercourse . [w]hen the victim is overcome by force or fear." K.S.A. 21-3501(1) defines "sexual intercourse" as "any penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however slight, is sufficient to constitute sexual intercourse."

An attempt, under K.S.A. 21-3301(a), is "any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime."

K.S.A. 21-3205 provides:

> "(1) A person is criminally responsible for a crime committed by another if such person intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime.
>
> "(3) A person liable under this section may be charged with and convicted of the crime although the person alleged to have directly committed the act constituting the crime lacked criminal or legal capacity or has not been convicted or has been acquitted or has been convicted of some other degree of the crime or of some other crime based on the same act."

Charging Deficiency

Because defendants filed a pretrial motion to question whether these counts in the amended complaint charged crimes under Kansas law, we apply the standard that predates our opinion in *State v. Hall*, 246 Kan. 728, 764-65, 793 P.2d 737 (1990), *overruled on other grounds Ferguson v. State*, 276 Kan. 428, 78 P.3d 40 (2003) (charging document challenge raised for first time on appeal must meet higher burden). See *State v. Reyna*, 290 Kan. 666, 677, 234 P.3d 761 (2010). Under the pre-*Hall* standard, "'[A] conviction based upon an information which does not sufficiently charge the

offense for which the accused is convicted is void.'" *State v. Schultz*, 252 Kan. 819, 835, 850 P.2d 818 (1993) (quoting *State v. Bird*, 238 Kan. 160, 166, 708 P.2d 946 [1985]). This issue presents a question of law over which this court's review is unlimited. *Reyna*, 290 Kan. at 675.

In all of the counts challenged, the defendants were charged with "causing" the victim of the rape or attempted rape to rape or attempt to rape another person. The State identified the victim in each count by denoting the individual who did not consent to the sexual intercourse and who had been overcome by force or fear. The individual counts did not identify whether the other person involved did not consent or was overcome by force or fear. The defendants did not personally, physically rape or attempt to rape anyone under these counts. The coercion described in each count was exerted by the defendants only on the victim.

We see several interrelated problems with these charges.

First, our rape statute does not make causing a rape to be committed a crime. This is in contrast to other Kansas statutes, such as the one defining aggravated criminal sodomy. See K.S.A. 21-3506(a)(3)(A) (crime includes "causing a person, without the person's consent, to engage in sodomy with any person [w]hen the victim is overcome by force or fear). Here, each defendant was properly charged, tried, and convicted of two counts of aggravated criminal sodomy for causing Holly G. to perform oral sex on Heather M. and for causing Heather M. to perform oral sex on Holly G. The aggravated criminal sodomy statute and the two counts borrowing from its language make clear

that the victim is the person unwillingly caused to engage in the sexual conduct by the defendants. The rape statute does not.

Second, the State's eventual intermittent invocation of aiding and abetting theory under K.S.A. 21-3205(1) does not cure the charging deficiency, because aiding and abetting theory requires the existence of a principal. Aiding and abetting presupposes the existence of more than one actor, the defendant and the principal he or she assists. See *United States v. Townsend*, 924 F.2d 1385, 1394 (7th Cir. 1991). "'[T]o establish guilt on the basis of aiding and abetting, the State is required to show that a defendant knowingly associated with the unlawful venture and participated in such a way as to indicate that [the defendant] was facilitating the success of the venture.'" *State v. Robinson*, 293 Kan. 1002, 1038, 270 P.3d 1183 (2012) (quoting *State v. Baker*, 287 Kan. 345, 366, 197 P.3d 421 [2008]). There was no principal for the defendants to have intentionally aided, abetted, advised, hired, counseled or procured to commit the crimes under the language of these charges. The only person aided, abetted, advised, hired, counseled, or procured was the person each charge identified as the victim of the crime.

The State also has attempted to rely on innocent agent theory under K.S.A. 21-3205(3). At first, it attempted to persuade us that the victim of each of these crimes also qualified as the defendants' innocent agent who committed the crimes at their behest. This theory is inconsistent with our precedent on innocent agency.

Our leading case on innocent agent theory is *State v. Doyen*, 224 Kan. 482, 580 P.2d 1351 (1978). In that case, we held that Ross Doyen, a candidate for reelection to the Kansas Senate, could not be convicted of fraudulent campaign finance reporting after withholding campaign contributions from his treasurer. 224 Kan. at 491. The State charged Doyen with "causing false campaign finance reports to be filed" in violation of K.S.A. 25-4129, which prohibited intentionally making any false material statement in a campaign finance report. 224 Kan. at 484. The State also maintained that Doyen was liable as an aider and an abettor or under an innocent agent theory.

We rejected each of the State's three arguments. First, the statutory definition of the crime did not support criminal culpability for "causing" fraudulent reporting. 224 Kan. at 488. The theory of the case thus required impermissible judicial extension of the conduct prohibited by the legislature. 224 Kan. at 488-89. Second, the State's aiding and abetting theory of the case failed because the treasurer had acted in good faith and fully and timely reported all contributions known to him. We explained: "The rule which holds an aider and abettor liable is thus not applicable since, under the facts of this case, there is no other person who committed a crime as the principal who was aided and abetted by the defendant Doyen." 224 Kan. at 490. Finally, the State's innocent agent theory failed because, as a candidate, Doyen was outside of the class of persons contemplated by the statute and could not himself violate it. 224 Kan. at 490-91.

> "[A]s a general rule, if a person causes a crime to be committed through the instrumentality of an innocent agent, he is the principal in the crime and punishable accordingly This general rule is applicable only in factual situations where the defendant could be found guilty as a principal if he committed the act himself." *Doyen*, 224 Kan. at 490.

Doyen could not be found guilty as a principal if he committed the act himself, because the statute did not make him responsible for filing campaign finance reports. Only the campaign treasurer had that responsibility. 224 Kan. at 488.

As in *Doyen*, the governing statute does not make causing rape, as charged here, a crime. The purported principal, *i.e.*, the person caused to commit rape or attempted rape, could not be convicted of the crime because, like Doyen's campaign treasurer, he or she did not possess even general criminal intent to commit the *actus reus* necessary for the crime. See *State v. Brown*, 291 Kan. 646, 654, 244 P.3d 267 (2011) (*mens rea* for rape general intent); see also *People v. Hamlin*, 170 Cal. App. 4th 1412, 1460, 89 Cal. Rptr. 3d 402 (2009) (duress can negate intent, capacity to commit crime). Neither R. Carr nor J. Carr could be found guilty as a principal because, as with Doyen and the finance report filings, they did not physically participate in the completed or attempted crime.

More recently, the State also has argued that the innocent agent in each of these scenarios was the person upon whom the defendants caused the crimes to be perpetrated, *e.g.*, Heather M. in Count 25. Given the facts as ultimately testified to by Holly G., this could

have been properly charged under our rape statute, but it was not. See Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323 (1985) (discussing difficulty of charging certain crimes when agency of another required). There is no question that the conduct the State attempted to punish demonstrated depravity on the part of the two intruders. But the language in each of the counts under examination stated only that the defendants compelled the victim to commit an act; it said nothing about how the other participant or anticipated participant in the *actus reus*, *i.e.*, the sexual intercourse, came to be involved. The counts certainly did not treat the other participant as an essential component of the crime, the agent without whom the defendants committed no crime under Kansas law.

These charging weaknesses made certain problems of proof and jury instructions nearly inevitable. But we need not reach those problems today because we hold that the charging deficiencies deprived the district court of subject matter jurisdiction. This renders R. Carr's convictions on Counts 25, 26, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40 void.

Two final points bear mention.

The State is correct that the Kansas rape statute is gender-neutral on the identity of the rapist and the person raped. It is legally possible for a female to rape a male. See *State v. Brooks*, 46 Kan. App. 2d 601, 616, 265 P.3d 1175 (2011). But the definition of sexual intercourse in K.S.A. 21-3501(1) incorporated by the rape statute is anatomically specific; it makes the participation of a female indispensable, because it requires penetration, however slight, of a woman's sex

organ. Thus a male can only rape another male with female participation—whether contributed by a willing criminal confederate whom he aids and abets; a coerced participant, as here; or by one willing to participate in the sex act but unaware of the defendant's nefarious behavior. The accused male can aid and abet a female principal, or he can act as a principal by employing a female agent, but he cannot accomplish the crime as defined by our legislature without her. Of course, a male can also aid and abet a male principal, regardless of how the principal commits the crime.

Count 41 of the amended complaint charged rape of Holly G. based on her digital penetration of herself after J. Carr told her to "get [herself] wet." Count 41, despite defense argument to the contrary, does not suffer from the same deficiencies as the vacated victim-on-victim rape and attempted rape counts. First, it is distinct because no second victim is involved. Also, again, it is possible under Kansas law for an accused male to be criminally culpable as the principal in a rape of an unwilling female victim overcome by force or fear, even though the accused has acted through an innocent agent to accomplish penetration by the required finger, male sex organ, or object. As Count 41 charged, Holly G. was both the female victim whose sex organ was penetrated and the innocent agent who achieved penetration for the principal, J. Carr; and R. Carr was J. Carr's accomplice.

14. SUFFICIENCY OF EVIDENCE ON COUNT 41

In J. Carr's separate appeal, he has challenged the sufficiency of evidence to support his conviction on Count 41. Because R. Carr also was convicted on Count 41 as an aider and abettor, we notice this unassigned

potential error in his appeal under K.S.A. 2013 Supp. 21-6619(b).

On a sufficiency claim we determine whether, viewing all of the evidence in the light most favorable to the prosecution, we are convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. See *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011).

J. Carr's argument is that Holly G.'s testimony was inadequate to establish that he "ordered her to commit an act of penetration, or that he even suggested it." In his view, because other options were available to Holly G. to accomplish the end he desired, the State did not prove rape beyond a reasonable doubt.

The Count 41 rape was charged under K.S.A. 21-3502(a)(1)(A), which defines rape as "[s]exual intercourse with a person who does not consent" under circumstances when "the victim is overcome by force or fear." K.S.A. 21-3501(1) defines "sexual intercourse" as "any penetration of the female sex organ by a finger, the male sex organ or any object."

As discussed in Section 13 of this opinion, the Kansas rape statute is gender-neutral on the identity of the penetrating participant. The finger used for a digital rape need not belong to a male. See K.S.A. 21-3502; *State v. Wright*, 290 Kan. 194, 224 P.3d 1159 (2010) (defendant convicted in digital rape case female). But the definition of sexual intercourse under Kansas law requires the participation of a female so that the necessary penetration of a female sex organ can occur. See K.S.A. 21-3501(1).

In addition, it is possible under Kansas law for an accused male to be criminally culpable as the principal in a rape of an unwilling female victim overcome by force or fear, even though the accused has acted through a—willing or unwilling, innocent or not-so-innocent—agent to accomplish penetration by the required finger, male sex organ, or object. See K.S.A. 21-3205(1); K.S.A. 21-3205(3).

On the facts of this case, according to the State, Holly G. was both the female whose sex organ was penetrated and the innocent agent who achieved penetration for the principal, J. Carr. The State asserts that its proof of all of the other rapes committed at the Birchwood residence permitted the jury to draw a reasonable inference that J. Carr's intent when he ordered Holly G. to "get [herself] wet" was for her to do exactly as she did.

Although there may have been nonpenetration options available to Holly G. when J. Carr issued his order to her, we agree with the State. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational factfinder could have convicted J. Carr as the principal and R. Carr as the aider and abettor on Count 41.

15. MULTIPLICITY OF COUNTS 41 AND 42

Neither R. Carr nor J. Carr raises an issue on appeal of whether their convictions of rape on both Counts 41 and 42 in the amended complaint are multiplicitous. Under the authority of K.S.A. 2013 Supp. 21-6619(b), we notice this unassigned error as to each defendant—in this appeal for R. Carr as the aider

and abettor and in J. Carr's separate appeal as the principal.

As discussed in Section 14, the Count 41 rape charge was based on Holly G.'s digital penetration of herself when J. Carr commanded that she "get [herself] wet." The Count 42 rape charge was based on J. Carr's penile rape of Holly G. immediately after she digitally penetrated herself.

When digital penetration is used to "assist" in accomplishing [the] ultimate goal of penile penetration, they are not factually separate; they constitute unitary conduct. See *State v. Weber*, 297 Kan. 805, 810-11, 304 P.3d 1262 (2013); *State v. Colston*, 290 Kan. 952, 964, 235 P.3d 1234 (2010). The digital penetration and penile penetration that form the basis for Counts 41 and 42 will not support two convictions here, and thus Count 42 must be reversed. See *State v. Scott*, 286 Kan. 54, 68, 183 P.3d 801 (2008) (reversal of multiplicitous conviction appropriate remedy).

16. ACCOMPLICE CULPABILITY FOR CODEFENDANT'S SEX CRIMES

R. Carr does not argue on appeal that the evidence was insufficient to convict him as an aider and abettor of J. Carr's rapes and attempted rape of the two female Birchwood victims. But J. Carr does raise an aider and abettor sufficiency claim in his separate appeal, arguing that the State's evidence did not support his guilt beyond a reasonable doubt for R. Carr's rape and aggravated criminal sodomy of Holly G.

Because the evidence underlying all of these sex crimes was substantially similar in one respect—Holly G. did not testify that the codefendant aider and

abettor had actual, contemporaneous knowledge of the commission of the crime by the principal or that the aider and abettor was present in the immediate vicinity of the principal and the victim during the sex act—we notice this unassigned aider and abettor sufficiency claim for R. Carr under the authority of K.S.A. 2013 Supp. 21-6619(b).

Additional Factual and Procedural Background

Counts 41 and 42 apparently charged rape of Holly G. by J. Carr, with R. Carr as the aider and abettor. The conduct leading to these counts, according to Holly G.'s testimony, occurred outside of Jason B.'s bedroom near the wet bar while the second intruder was out of the home to take Brad H. to make ATM withdrawals. Count 43 apparently charged attempted rape of Heather M. by J. Carr, with R. Carr as aider and abettor, during the same time window.

Holly G. was the third person taken out of the home to make ATM withdrawals. At the time of her trip with the second intruder, whom she later identified as R. Carr, both intruders had already actively participated in coercing the victims to perform sex acts with each other while the intruders watched. During the ATM trip, the second intruder asked Holly G. whether the first intruder had raped her during his absence from the home. When she said yes, he asked her whether the rape had been her first sexual experience with a black man and, particularly perversely, how she would rate its comparative quality.

Soon after the second intruder finished his fourth trip to the ATM, he raped and sodomized Holly G. in the dining room of the home. Count 44 apparently

charged this rape by R. Carr, with J. Carr as the aider and abettor. Count 45 charged aggravated criminal sodomy of Holly G., apparently by R. Carr, with J. Carr as the aider and abettor. These two crimes took place in the dining room of the home. Holly G. did not testify about J. Carr's exact position in the home during the commission of these crimes.

The second intruder evidently was near Holly G. when she went to the bathroom after he had raped and sodomized her. When Holly G. opened the door to the bathroom, she witnessed the first intruder raping Heather M. and was ordered to shut the door. This rape of Heather M. apparently was charged in Count 46, with R. Carr as the aider and abettor. After J. Carr had finished with Heather M., he raped Holly G. in the bathroom as well. This rape apparently was charged in Count 47.

Evidence in Support of Charges

Again, on a sufficiency claim we determine whether, viewing all of the evidence in the light most favorable to the prosecution, we are convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. See *McCaslin*, 291 Kan. at 710.

There was abundant evidence in this case to support the jury's conviction of R. Carr as an aider and abettor of J. Carr on Counts 41, 42, 43, 46, and 47.

All of Holly G.'s testimony about what occurred during the intruders' time at the Birchwood residence described their concerted, joint action and mutual encouragement. Even when they were temporarily in different rooms of the home, and even when the second

intruder left the residence four times to take individual victims to make ATM withdrawals, the two intruders encouraged and enabled one another in the commission of all of the sex crimes.

The evidence of the second intruder's conversation with Holly G. during their ATM trip is especially telling—strongly indicative of his approval of and willingness to facilitate the first intruder's sexual violence. Knowing what the second intruder knew when he returned to the home with Holly G., there is no evidence that he did anything to discourage or disapprove of the first intruder. On the contrary, he eventually joined in by raping and sodomizing Holly G. himself, implicitly endorsing the first intruder's similar behavior. The second intruder also did nothing to intervene in Heather M.'s rape by the first intruder, even though it is likely he became aware of it when Holly G. became aware of it. Finally, there is no testimony that he uttered a word of protest when the first intruder then raped Holly G.

It is simply not necessary that an aider and abettor be contemporaneously aware that his or her principal is committing a crime that the aider and abettor has encouraged or facilitated. It also is not necessary that an aider and abettor be in the immediate vicinity of the principal and the victim during commission of the crime. See K.S.A. 21-3205; *State v. Wilson*, 221 Kan. 359, 366, 559 P.2d 374 (1977) (driver of get-away vehicle intentionally aids, abets in commission of crime, may be charged with, convicted of crime despite not participating at scene); *State v. Dunn*, 243 Kan. 414, 430, 758 P.2d 718 (1988) (same).

R. Carr is not entitled to reversal of his convictions on Counts 41, 42, 43, 46, and 47 for insufficiency of the evidence. His conviction on Count 42 must be reversed as multiplicitous with his conviction on Count 41, as fully discussed in Section 15 of this opinion.

17. Subject Matter Jurisdiction on Attempted Rape

R. Carr challenges his conviction on Count 43 of the amended complaint, an attempted rape of Heather M., arguing that this count did not name him as a perpetrator and thus failed to confer subject matter jurisdiction on the district court.

The State argues that, if a jurisdictional defect existed in the complaint, it was one of personal rather than subject matter jurisdiction and that R. Carr's failure to challenge the defect in a pretrial motion waived any claim of error. The State bases its argument on a reading of the complaint as a whole, observing that the caption of the amended complaint contained R. Carr's name, and that, unlike the three counts charging criminal possession of a firearm against R. Carr, which do not contain J. Carr's name at all, Count 43 does contain R. Carr's name in its text.

Additional Factual and Procedural Background

Of the 58 counts in the amended complaint, 54 allege that both R. Carr and J. Carr committed the subject crime. Of the remaining four counts, three are the charges against R. Carr alone on criminal possession of a firearm. The remaining count, Count 43, reads:

"[A]nd on or between the 14th day of December, 2000, A.D., and the 15th day of December, 2000, A.D., in the County of Sedgwick, State of Kansas, one JONATHAN D. CARR a/k/a JONATHAN HARDING did then and there unlawfully, towards the perpetration of the crime of Rape, as defined by K.S.A. 21-3502, commit the following overt act, to wit: attempt to cause Heather [M.] to engage in an act of sexual intercourse with REGINALD D. CARR a/k/a REGGIE CARR and JONATHAN D. CARR a/k/a JONATHAN HARDING while Heather [M.] did not consent to said sexual intercourse while Heather [M.] was overcome by force or fear, with the intention to commit said crime;

Contrary to Kansas Statutes Annotated 21-3301 and 21-3502(1)(a), Attempted Rape, Severity Level 3, Person Felony, Count Forty-Three"

In contrast, all other charges stemming from the Birchwood crimes begin with the words: "[A]nd on or between the 14th day , one REGINALD D. CARR a/k/a REGGIE CARR and JONATHAN D. CARR a/k/a JONATHAN HARDING did then and there unlawfully
"

The jury instruction on the amended complaint's Count 43 said that "each defendant" was charged with the attempted rape of Heather M., *i.e.*, it did not contain the same error alleged in the complaint. And the jury found R. Carr guilty.

It is apparent that the State intended to charge both defendants for each crime in the amended complaint, one on the theory that he was the principal and one on the theory that he was the aider and abettor, with the exception of the three counts for criminal possession of a firearm. The original complaint charged only R. Carr with aggravated criminal sodomy of Holly G. and only J. Carr with rape of Holly G. In contrast, Counts 42 and 44 of the amended complaint each charge both defendants with rape of Holly G. Count 45 of the amended complaint charges both defendants with aggravated criminal sodomy.

The jury was instructed that a person who "intentionally aids, abets, advises, or counsels another to commit a crime" is criminally responsible for those crimes, as well as any other crime that "was reasonably foreseeable." R. Carr's appellate challenges to this instruction are discussed in Section 25 of this opinion.

Personal or Subject Matter Jurisdiction

A jurisdictional issue raises a question of law over which we exercise unlimited review. See *State v. Alonzo*, 296 Kan. 1052, 1054, 297 P.3d 300 (2013).

Jurisdiction is typically divided into two separate components—personal and subject matter. *State v. Bickford*, 234 Kan. 507, 508, 672 P.2d 607 (1983). A court must be vested with both types of jurisdiction in order to act. 234 Kan. at 508-09. Personal jurisdiction requires that a "party must appear generally or submit to the jurisdiction of the court" and subject matter jurisdiction authorizes the court to hear and determine a case. 234 Kan. at 509.

Generally, an accused who pleads to the merits of the action "waives all objections with respect to the court's jurisdiction of his person." *State v. Wharton*, 194 Kan. 694, 696, 401 P.2d 906 (1965) (citing 22 C.J.S., Criminal Law § 162, p. 421; 4 Wharton's Criminal Law and Procedure, § 1890, p. 759 [1957]). The State contends this is exactly what R. Carr did here. In contrast, the issue of subject matter jurisdiction may be raised at any point by any party, even the court. *State v. Patton*, 287 Kan. 200, 205, 195 P.2d 753 (2008).

The State is incorrect on whether Kansas treats this type of alleged defect as a matter of personal or subject matter jurisdiction. If the omission here truly qualifies as an omission of R. Carr's name from the charge, we believe there is a subject matter jurisdiction problem. See *State v. Breedlove*, 285 Kan. 1006, 1013, 179 P.3d 1115 (2008) (citing *State v. Johnson*, 283 Kan. 649, 656, 156 P.3d 596 [2007] [court without jurisdiction when jury instructed on crime not originally charged, nor lesser included of crime originally charged]; *State v. Elliott*, 281 Kan. 583, Syl. ¶ ¶ 1, 2, 133 P.3d 1253 [2006] [municipal courts without subject matter jurisdiction over felony driving under the influence]; *State v. Belcher*, 269 Kan. 2, 8-9, 4 P.3d 1137 [2000] [court without jurisdiction; crime of conviction not lesser included offense of charged crime]); see also *State v. Chatmon*, 234 Kan. 197, 205, 671 P.2d 531 (1983) (battery conviction clear violation of due process when neither charged in information nor lesser included offense of charged rape), *abrogation on other grounds recognized by State v. Everett*, 296 Kan. 1039, 1045, 297 P.3d 292 (2013).

Application of State v. Hall

This court has recognized that "the fundamental purpose of the pleading is to inform the defendant of the charge so that the defendant may prepare a defense." *State v. Hall*, 246 Kan. 728, 754, 793 P.2d 737 (1990), *overruled on other grounds by Ferguson v. State*, 276 Kan. 428, 78 P.3d 40 (2003).

In *Hall*, the defendant asserted for the first time on appeal that his conviction on a particular charge was void for lack of subject matter jurisdiction because of omission of an essential element of the crime in the charging document. This court recognized the error and reversed the conviction based on existing precedent. 246 Kan. at 746-47. But, at the conclusion of the opinion, we enunciated a new rule to be applied in future cases when a defendant complained of a defective charging document for the first time on appeal. 246 Kan. at 765. We said: "Common sense will be a better guide than arbitrary and artificial rules. The sufficiency of an information should be determined on the basis of practical rather than technical considerations when addressed for the first time on appeal." 246 Kan. at 754 (citing *State v. Wade*, 244 Kan. 136, 141, 766 P.2d 811 [1989]; *State v. Micheaux*, 242 Kan. 192, 199, 747 P.2d 784 [1987]; 1 Wright, Federal Practice and Procedure: Crim.2d § 125 p. 385 [1982]).

Since *Hall*, the proper procedure for a defendant to challenge a defect in the complaint, information, or indictment is to file a motion to arrest judgment under K.S.A. 22-3502. *Hall*, 246 Kan. at 760. The motion, to be filed within 14 days of the verdict, asks the district court to "arrest judgment if the complaint, information

or indictment does not charge a crime or if the court was without jurisdiction of the crime charged." K.S.A. 22-3502.

When such a motion "is timely filed, the trial court, in reviewing the motion, shall test its merit by utilizing the rationale of our pre-*Hall* cases." *Hall*, 246 Kan. at 764. The same is not true when a charging document's ability to confer subject matter jurisdiction is challenged for the first time on appeal. Then

> "we shall look to whether the claimed defect in the information has: (a) prejudiced the defendant in the preparation of his or her defense; (b) impaired in any way defendant's ability to plead the conviction in any subsequent prosecution; or (c) limited in any way defendant's substantial rights to a fair trial under the guarantees of the Sixth Amendment to the United States Constitution and the Kansas Constitution Bill of Rights, § 10. If a defendant is able to establish a claim under either (a), (b), or (c), the defective information claim, raised for the first time on appeal, will be allowed." 246 Kan. at 765.

In addition,

> "[t]ardily challenged informations are to be construed liberally in favor of validity. The validity of an information is to be tested by reading the information as a whole. The elements of the offense may be gleaned from the information as a whole. An information not challenged before verdict or finding of guilty or pursuant to K.S.A. 22-3502 by a motion for

> arrest of judgment will be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." 246 Kan. at 764 (citing *United States v. Watkins*, 709 F.2d 475, 478 [7th Cir. 1983]).

The omission of R. Carr's name in the first part of the text of Count 43 is akin to a technical defect. He has not argued or demonstrated that he was misled by the wording error; that his defense would have been any different, had the error not occurred; or that he suffered any other undue prejudice. His failure to file a motion for arrest of judgment within 14 days of the verdict is fatal to this claim on appeal.

18. THIRD-PARTY EVIDENCE AND HEARSAY EXCEPTIONS

R. Carr asserts that Judge Clark misapplied Kansas third-party evidence rule and erred by rejecting appropriate hearsay exceptions, making it impossible for him to testify on his own behalf about three telephone calls he received from J. Carr during the night of the Birchwood crimes and about face-to-face interaction with J. Carr and another black male in possession of Jason B.'s truck and other stolen property. See *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed 2d 37 (1987) (discussing federal constitutional underpinnings of right to testify in one's own defense, relying on Fifth, Sixth, Fourteenth Amendments); Kan. Const. Bill of Rights, § 18 (right to remedy for injuries by due course of law). These errors by Judge Clark, R. Carr argues, also interfered with his due process right to present his theory of defense. See *Rock*, 483 U.S. 44; *Crane v. Kentucky*, 476 U.S. 683, 106

S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Additional Factual and Procedural Background

Review of the merits of this issue requires a fairly detailed examination of pertinent events at several stages of the district court proceedings to discern the bases of the parties' positions and Judge Clark's decisions.

R. Carr's planned defense on the Birchwood incident was that all of the crimes were committed by J. Carr and an unknown and uncharged black male.

Nearly 6 months before trial began, R. Carr filed a sealed supplement to a memorandum in support of a motion to sever the defendants' trials. The supplement was not provided to the State. Appellate counsel now describes its contents as a written proffer of R. Carr's anticipated trial testimony. For ease of reference, we set out the pertinent part of the supplement here:

> "2. On the evening of December 14, 2000, Reginald Dexter Carr, Jr. and his brother, Jonathan Carr, met at the home of Tronda Adams and Toni Green. Reginald and Jonathan were both traveling in a beige Toyota Camry belonging to Stephanie [Donley].
>
> "3. After leaving the Green residence together, Reginald Dexter Carr, Jr. and Jonathan Carr traveled to the apartment complex located at 5400 E. 21st Street in Wichita, Sedgwick County, Kansas. Upon their arrival, Jonathan Carr dropped off Reginald

Dexter Carr, Jr. and left in the beige Toyota. Reginald Dexter Carr, Jr., not wanting to alert Stephanie [Donley] that he had loaned her car to his brother, left in his (Reginald's) white Plymouth Fury. After leaving the apartment complex, Mr. Reginald Dexter Carr, Jr. traveled around the northern part of Wichita, Sedgwick County, Kansas, and attempted to sell drugs.

"4. Mr. Jonathan Carr met another individual whose name is not now known to the defendant, Reginald Dexter Carr, Jr. Mr. Jonathan Carr and the other unknown individual went to 12727 East Birchwood and committed the crimes more fully set out in the [a]mended [c]omplaint .

"5. Sometime after the commission of the crimes associated with the [] Birchwood address, Jonathan Carr located his brother, Reginald Dexter Carr, Jr. and made arrangements for Reginald Dexter Carr, Jr. to store the property taken from the Birchwood address in Stephanie [Donley's] apartment

"Prior to the commission of the crimes at the Birchwood address, Reginald Dexter Carr, Jr. had no knowledge of the facts that were about to unfold, nor did he participate in any preparation or plan to effect the same.

"6. After receiving information from his brother, Jonathan Carr, as to the approximate location of the origin of the property, Reginald Dexter Carr, Jr. drove by the area of 12727 E.

> Birchwood. Mr. Reginald Dexter Carr, Jr. was detained briefly and questioned by law enforcement officers on 127th Street East.
>
> "7. Later that morning, December 15, 2000, Mr. Reginald Dexter Carr, Jr. was arrested at [Donley's apartment,] after unloading the stolen property from the Dodge Dakota pickup truck owned by Jason [B.]."

A few weeks before trial was to begin, the State filed two in limine motions. One sought to prevent introduction of out-of-court statements made by any defendant who had not waived his right against self-incrimination and testified at trial. The other motion sought to prevent defendants from introducing "circumstantial evidence" that someone other than they had committed the charged crimes. The State quoted language from *State v. Bornholdt*, 261 Kan. 644, 666, 932 P.2d 964 (1997), *disapproved on other grounds by State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004): "[W]hen the [S]tate relies on direct evidence, circumstantial evidence that someone other than the defendant committed the crime charged is irrelevant in the absence of other evidence to connect such third party with the crime."

R. Carr filed a written response but made an argument only on the third-party evidence motion, which he challenged as premature. He also argued that the motion failed to set forth a factual basis, giving it the appearance of a "discovery device."

J. Carr filed more lengthy responses to both motions. His response to the hearsay motion argued that the State's nonspecific request to exclude hearsay

was overly broad and premature. On the third-party evidence motion, he also argued that the motion was premature and too vague to allow Judge Clark to "intelligently rule." The State must specify, he said, the evidence it wanted to exclude. J. Carr also argued that there was no difference between the probative value of direct evidence and the probative value of circumstantial evidence and that the third-party evidence rule, as outlined by the State, would deprive him of his right to present a defense. He suggested that the proper standard for admission of third-party evidence should be whether the evidence raised an inference capable of leading a jury to conclude there was reasonable doubt on the defendant's guilt.

At the hearing on the two motions, the State said its hearsay motion had been filed because of statements at earlier court proceedings about the possibility of alibi defenses. The prosecutor said that the State was not seeking to exclude any out-of-court statements by a nontestifying defendant that would fall within an exception to the rule that hearsay is inadmissible; rather, the State wanted to raise the issue early to ensure that such information was not heard by the jury before Judge Clark had an opportunity to rule on the applicability of any exception.

On the third-party evidence motion, the State again asserted, citing to *Bornholdt*, that the Kansas rule prohibited a criminal defendant from introducing circumstantial evidence of a third person's guilt when the State's case would include direct evidence against the defendant:

"Direct must be countered with direct .

> "[T]he direct evidence that the State is looking at in filing this motion is eyewitness direct testimony which must be countered by similar direct in order to disprove identification as opposed to circumstantial evidence that some other person did this crime. It is commonly called outside the courtroom the SODDI defense, some other dude did it."

The prosecutor also clarified that the State sought to eliminate circumstantial evidence of another perpetrator's guilt only on the crimes charged as a result of the Birchwood incident, not on the charges arising out of the Schreiber or Walenta incidents.

Counsel for J. Carr responded by acknowledging the *Bornholdt* language cited by the State and said that, if he were to introduce evidence of a third party's culpability, he knew he would have to establish a link between the third party and the crimes beforehand. Counsel for R. Carr said he had nothing to add to the argument.

Judge Clark's brief ruling contained the word "sustained" but was otherwise difficult to decipher:

> "Everybody agrees then on *Bornhol[d]t* that direct and circumstantial type evidence and then the incidents that occurred on the 7th and 11th, any evidence concerning that would be circumstantial. So, I'll sustain it then and just say that if any evidence like that is anticipated, please bring it to somebody's attention so we can handle it properly."

The State drafted the written order memorializing the court's rulings on the motions. Although there are

references to the "orders" in transcripts of later hearings, we have found no order on the hearsay motion in the record and the parties have not cited to one. The essential portion of the order on the third-party evidence motion simply indicated the motion was sustained. The order had no other substantive content.

The subject of third-party evidence did not come up again until the opening statement of R. Carr's counsel at trial. He told the jury that the evidence on the Birchwood crimes would show that four "Negroid hairs" were recovered and submitted for mitochondrial DNA testing, that one ultimately was not tested, that two showed contributors with the defendants' maternal lineage, and that the fourth came "from an as yet unidentified black person." He also told the jury that R. Carr and J. Carr parted during the evening of December 14, 2000, and did not see each other again until about 5 a.m. the next morning, when J. Carr contacted R. Carr and asked that he come to Adams' house. When R. Carr arrived, he saw J. Carr and another black male, who was in possession of a truck filled with stolen property. The three decided that the truck would be driven to Donley's apartment by the other black male; that R. Carr would return Donley's car, which J. Carr had, to Donley's apartment, and that R. Carr would leave his old Plymouth for J. Carr.

Counsel for J. Carr objected to these statements by counsel for R. Carr as argumentative and unsupported by evidence. Judge Clark overruled the objection.

Counsel for R. Carr resumed his opening statement:

> "He left—Reginald left his car with Jonathan, the third black male drove the truck. When they got to the apartment complex the third black male did not assist in carrying any of the stolen property into Ms. Donley's apartment, it was decided that person would pick up his share later."

Counsel then turned to a description of R. Carr's arrest and subsequent attempts by law enforcement to have the victims of the various crimes identify him. Counsel concluded his opening statement, however, by returning to the subject of the Birchwood crimes.

> "The evidence will show that the Birchwood address is replete with Jonathan Carr's DNA. The evidence will also show that there is the DNA of an unidentified third party there. The evidence will also show that the Lorcin automatic weapon that you heard talk about contains the DNA of three unidentified people, none of that DNA is Reginald Carr's.
>
> "Ultimately, the DNA evidence will show that Jonathan Carr, not Reginald Carr, Jonathan Carr committed most, if not all of the crimes which are alleged in the complaint and that he did it with a third black male who still walks the streets of Wichita."

At that point, the prosecution objected to the comments, and the judge sustained the objection, labeling the remarks "improper."

After opening statements were completed and testimony taken from three witnesses, the jury was excused from the courtroom for lunch. The State then

asked the judge to impose sanctions on the lawyer for R. Carr who had made the opening statement, John Val Wachtel, and sought an instruction to the jury to disregard Wachtel's remarks about another perpetrator. The State argued that Wachtel had deliberately violated the judge's order on the motions in limine, both by suggesting that J. Carr had made statements to R. Carr about the Birchwood crimes and by suggesting that a third black male was involved.

> "Unless counsel intends to call some individual that he failed to name in his opening statement, some third individual that has confessed to this crime or made some other statements directly to Reginald Carr, that individual would fall in the category—or those statements would fall into the category of circumstantial evidence, unless based, again, on statements made by Jonathan Carr, which are not admissible, nor appropriate. The Court ruled on this."

The prosecutor also said that she had spoken with counsel for both defendants that morning before the opening of court and that she believed each understood the opening statement material that was off limits under the court's orders in limine.

> "When I made those comments to [Wachtel] I told him that in addition to objecting, if there's a violation of the Court's orders in limine, that that would certainly place us in a situation which might necessitate a mistrial and that he certainly would not want to do that. He indicated he would not be mistrying anything."

Cocounsel for R. Carr responded to the prosecution's argument about Wachtel:

> "Well, first of all, let's talk about the hearsay evidence when we're talking about statements of Jonathan Carr. If I remember correctly, it was [the State] that initially started talking about conversations between Tronda Adams and Jonathan Carr. And I don't think Mr. Wacht[e]l ever talked about conversations between Jonathan Carr and Reginald Carr. I think the record's clear and I think the Court can examine it.
>
> "As to the order in limine, when we had that hearing I believe it was all—we all understood that if there was evidence of—direct evidence of the defendants' guilt and circumstantial evidence that someone else did it and we had evidence of that, unless we could connect it up, it wasn't admissible.
>
> "I think at this point in time, number one, it is premature; number two, I don't think the State has any direct evidence that Reginald Carr committed this crime. They don't have an in-court identification of the surviving victim. And we're only talking about the events on the 14th and 15th. They've got a photo array where she goes well, it looks like the guy. They don't have any DNA evidence that connects him up with this thing, all's they have is property that he has after the fact.
>
> "On the other hand, the evidence that we've got that somebody else is involved in it is we've

> got DNA evidence in this apartment that nobody can identify, we've got a black Negroid hair that belongs neither to Jonathan Carr nor Reginald Carr. You know, my way of looking at it we've got more direct evidence that Reginald Carr didn't commit this crime than we do direct evidence that he did.
>
> " I don't think Mr. Wacht[e]l has violated any order in limine, we have followed the law as we know it to be. And he hasn't done anything wrong. If the court finds at some later point in time that the evidence doesn't support what he said in this opening statement, then perhaps that's a different story. But as this Court well knows from sitting on many, many cases, we present this evidence as best we possibly can and we expect it to produce what Mr. Wacht[e]l has said."

At that point, Judge Clark turned to counsel for J. Carr. J. Carr's counsel noted that the prosecutor alluded to the possibility of a mistrial and then moved for one. He said:

> "And Your Honor, I think that Mr. Wacht[e]l's opening statements illustrate an argument that we've made many times early on in this case as to why we needed to be severed from this matter and have a separate trial from Reginald Carr. So if a mistrial were not granted, we again move to sever, withdraw from these proceedings to have our own separate trial."

One of the prosecutors clarified that the State was not seeking a mistrial; instead, she said, it sought

enforcement of Judge Clark's earlier orders in limine. She argued further:

> "This Birchwood case is a direct evidence case. [Holly G.] did identify Mr. Reginald Carr in a photo ID lineup, array. In addition to that, there's DNA evidence that connect[s] Mr. Carr, Reginald Carr. The blood of [Heather M.] is on the clothing collected.
>
> "Now, that may—could be argued as direct or circumstantial. In any event, the evidence certainly is strong in support of the ID that [Holly G.] made in the photo lineup."

Judge Clark then spoke:

> "First of all, the motion for mistrial on behalf of Mr. Jonathan Carr is overruled. The last statement [about the uncharged black male on the streets of Wichita], I believe I said that's misconduct. So stated. And as I understand evidence, lawyers don't get up and make declarations concerning evidence in opening statements that they don't have. If that declaration made about this some other party isn't supported in evidence, the inference that it's intentional misconduct would be well supported.
>
> "And what we'll do is examine the evidence and see what the evidence is and I'll instruct on what that means to the jury one way or the other."

On the 10th day of trial, the State's expert on the results of mitochondrial DNA tests on the four hairs

testified. One of the hairs yielded no results, perhaps, according to the expert, because it came from an animal or was too old and degraded. Two matched the mitochondrial DNA samples taken from the defendants. One did not match those samples and, the expert said, contained more of a Caucasian or European profile.

At the end of that day, after the jury had been excused, Judge Clark took up several miscellaneous matters. Among other things, he again addressed the third-party evidence rule:

> "Now, as to the law that if it be shown that a perpetrator at a crime is at the scene of the crime by direct evidence, then the circumstantial evidence may not be used to support the inference of a third party was there absent direct evidence of that fact. That's the law. That will be the law of this case."

After a brief interruption for the jury to pass through the courtroom, the judge continued:

> "I think we've reached a point that I can advise you all because we're getting close to the defense case in chief, so I think I've heard all the evidence that I need to, to make that decision.
>
> "And looking at—in the order of proof, and let's call it the 12727 Birchwood, H. G. puts both defendants present as perpetrators at that crime. Therefore, before any evidence to support the inference that a third party was there can be accepted, there must be direct evidence that a third party was there."

No further argument or comments were made on the topic at that time.

Three trial days later, the State presented the testimony of the Wichita Police Department chemist who had been asked to separate Negroid hairs from other hairs and fibers from the Birchwood home for DNA testing. She had labeled three of the hairs Negroid and the fourth "possibly" so.

The next day, a nuclear DNA analyst for Sedgwick County testified that he had examined a root attached to one of the two hairs for which the defendants and their maternal relatives could not be ruled out and that he had determined it did not come from R. Carr. J. Carr could not be excluded.

Later in the trial, during R. Carr's case-in-chief, his counsel advised Judge Clark outside the presence of the jury that R. Carr was weighing whether to testify. Counsel made an oral proffer to facilitate the judge's ruling on whether R. Carr's testimony would be admissible under the hearsay rule and its exceptions.

Counsel said that R. Carr would testify that he and J. Carr were together in the early evening of December 14 at Adams' house, that they parted ways, and that J. Carr then spent his time with the unknown, uncharged black male. Later that night and early on December 15, J. Carr called R. Carr three times. Counsel described those calls and related events and made a brief argument:

> "Later on that night sometime—the time is unclear, but after 11:00 o'clock, Reginald Carr got a telephone call from Jonathan telling him that he needed to come to a location, and that

Jonathan Carr said this dude—or this nigger is trippin' and talked about shooting people. Mr. Carr was distraught and emotional when he made those statements.

"Mr. Carr received another phone call from Jonathan, at which time Jonathan told him that this third person was—Jonathan was at or near [Adams'] house. Jonathan called and told him with regard to the third person that the person was down the street, flipped out, trippin[']. Jonathan was crying. Reginald asked about dealing with this person. Jonathan said the person had a gun. Reginald came to that location, spoke with the third person, and decisions were made with regard to what would be dealt with [on] that property. The decision was that the property would be taken to [Donley's] house, [Donley's] apartment.

"Also, there was another phone call in which Jonathan was distraught, talked about that same third person as, quote, trippin', unquote, and that he had shot people. And that—warned Mr. Reginald Carr that the evidence was—that the material at Mr. Carr's house was not only stolen, but that people had been killed and that Jonathan was leaving town.

"Those hearsay statements on behalf of Jonathan Carr and on behalf of the third party, we think are admissible in this case. Excited utterances.

"The—forgive me, your Honor, I don't remember the name of the rule as I stand here

> right now, but there's a rule that basically says no such statements about that kind of activity would not be made if they were not true [*sic*]. And the, statements with regard to the third person, identifying person of the res gestae of the possession of stolen property, are statements against interest. A simple rule on the earlier one.
>
> "That is my proffer of what that hearsay testimony would be."

Counsel for J. Carr had no objection to the admission of the proffered testimony, although it included out-of-court statements made by his client. He said that he would look forward to cross-examining R. Carr and that the content of the proffer strengthened his argument that the defendants had antagonistic defenses.

The prosecution did object to admission of the testimony, arguing it was "violative of the hearsay principles" and "inappropriate and improper" and "pure hearsay." In addition, the prosecutor argued:

> "[T]he Court has made it abundantly clear that he doesn't get to do this on his 'some other dude did it' kind of defense when they're direct cases. And this is inappropriate. And I still don't have a name of anybody that I can go to, and apparently it's in the possession of Mr. Wacht[e]l and his client."

After clarifying for the State that R. Carr did not know the name of the third party, counsel for R. Carr was asked to repeat the part of the proffer dealing with

a phone call from J. Carr when he was near Adams' house. Counsel did so, saying:

> "There was a telephone call. I do not know the time. It was after 11:00 o'clock. It was from Jonathan to Reginald talking about this third person trippin', shooting people, problems that were going on, gave directions to the residence. There was another phone call which invited Jonathan—Reginald to Tronda's house. Reginald went there. There was another conversation about the fellow down the street flipped out, trippin'. Jonathan was crying. Reginald went down and spoke to that person. There was another phone call later on after the third party had driven the truck to Reginald's house. At that time there were more discussions about people having been shot with respect to the stolen property. That was Jonathan that called Mr. Carr. And that's the proffer."

One of the prosecutors asked a clarifying question—whether R. Carr spoke personally to the other unknown black male—and was apparently satisfied that she received an answer. The other prosecutor then argued that R. Carr wanted to admit "hearsay evidence which the Court has clearly said is unexceptional" as to J. Carr. She also repeated that admission of the testimony would result in a

> "direct violation of the Court's ruling under what we refer to as the SODDI defense, some other dude did it, or suggestion thereof [T]here is no direct evidence here unless Reginald Carr is saying that he was there and watched it as an eyewitness or something more direct. There

> would be no direct evidence under the proffer that's made that should allow them to make this suggestion about another person. Not only to make a suggestion about another person, but introduce hearsay evidence of an individual who's not identified and [whom the defense is] refusing to identify, not only by name, but even by saying where they went down the street to speak to them. It's highly inappropriate. They've not identified any particular exception that [it] would clearly fall under because it doesn't."

Judge Clark offered counsel for R. Carr an opportunity to cite law in support of admission of the proffered evidence, and counsel said again that hearsay exceptions for declarations against interest and excited utterances should apply. The judge then ruled from the bench:

> "The declarations proffered under Mr. Reginald Carr's proffer just now fits no exception to the hearsay rule that I know of. They are not direct evidence of any participation by a third party. And based on everything I know right now, they're not admissible in evidence. They're offered to prove the truth of the matter stated therein. They're hearsay."

R. Carr did not testify at trial.

Third-Party Evidence Rule

The parties agree that the appellate standard of review for a district judge's ruling on a motion in limine invoking the third-party evidence rule is abuse of discretion. See *State v. Brown*, 285 Kan. 261, 303, 173 P.3d 612 (2007) (application of third-party evidence

rule subject to review for abuse of discretion); see also *State v. Shadden*, 290 Kan. 803, 817, 235 P.3d 436 (2010) (standard of review on evidentiary decision depends on rule, principle applied by district judge). When a district judge exercises his or her discretion based on an error or misunderstanding of law, there is an abuse of that discretion. See *Brown*, 285 Kan. at 294.

The only third-party evidence case cited by the State before Judge Clark was *State v. Bornholdt*, 261 Kan. 644, 932 P.2d 964 (1997), *disapproved by State v. Marsh*, 278 Kan. 520, 102 P.3d 445(2004). The State was correct that *Bornholdt* parroted certain earlier cases saying "[w]hen the [S]tate relies on direct evidence, circumstantial evidence that someone other than the defendant committed the crime charged is irrelevant in the absence of other evidence to connect such third party with the crime." 261 Kan. at 666. But the State and Judge Clark failed to realize that *Bornholdt*'s treatment of the subject was superficial; it did not explore the rule's origins or examine the soundness of its rationale.

The more recent and authoritative opinion at the time of trial of this case was *State v. Hooker*, 271 Kan. 52, 63, 21 P.3d 964 (2001), which stated a more complete, more nuanced third-party evidence rule and began to expose a recent tendency in some earlier caselaw to conflate uncorroborated evidence that someone else merely had a motive to commit the crime with circumstantial evidence that someone else actually did commit the crime.

Hooker involved a home invasion in which one of the victims identified Hooker as one of two men who forced

their way into a townhome and shot one of the residents in an apparent robbery attempt. Hooker sought to introduce evidence that two other people had threatened to harm the deceased victim. This court held that Hooker failed to provide evidence to connect the two other persons with the victim's death.

In it, this court said:

> "We have found that when the State's case relies heavily on circumstantial evidence, it is error to exclude circumstantial evidence that someone else committed the crime when the defendant's proffered evidence includes the timely placement of another person at the murder scene. See *State v. Hamons,* 248 Kan. 51, Syl. ¶ 2, 60-61, 805 P.2d 6 (1991) (finding an abuse of discretion to exclude evidence that another person had threatened the victim and was at the scene of the murder near the time of the murder where there was no eyewitness identification, but concluding that the error was harmless).
>
> "Conversely, we have been stricter on admission when the State relies on direct evidence, such as eyewitness identification. Circumstantial evidence that someone other than the defendant committed the crime is irrelevant in the absence of other evidence to connect that other person with the crime charged. *State v. Bornholdt*, 261 Kan. 644, Syl. ¶ 19, 932 P.2d 964 (1997). We have found no abuse of discretion in excluding such evidence in cases involving eyewitness identification testimony. *E.g., State v. Brown,* 230 Kan. 499, 500, 638 P.2d 912 (1982); *State v. Henderson,*

205 Kan. 231, 239-40, 468 P.2d 136 (1970); *State v. Potts,* 205 Kan. 42, 44, 468 P.2d 74 (1970).

"Hooker failed to show that the two people who allegedly made threats were involved in [the victim's] death. We have said:

> "'There is a general rule supported by numerous decisions that evidence of the motive of one other than the defendant to commit the crime will be excluded where there is no other proof in the case which tends to connect such other person with the offense with which the defendant is charged. [Citations omitted.]' *State v. Neff,* 169 Kan. 116, 123, 218 P.2d 248, *cert. denied* 340 U.S. 866 (1950)." *Hooker*, 271 Kan. at 65-66.

Within 2 years after trial of this case, we recognized and reasserted the lessons of *Hooker* in *State v. Evans*, 275 Kan. 95, 62 P.3d 220 (2003).

The facts in *Evans* were analogous to the facts here in many ways. Defendant Larry Evans was accused of shooting the victim, Michael Prince, during a heated discussion involving Evans, Prince, and a third man, Andrew Reed. Prince sprayed Reed and Evans with mace. Seconds later, a shot was fired, fatally wounding Prince. Evans was charged with first-degree murder. The State filed a pretrial motion in limine, anticipating a defense attempt to show Reed was responsible for the murder. The State argued that it had direct evidence that Evans committed the crime; thus Evans should be prohibited from presenting circumstantial evidence that Reed was responsible for Prince's death.

> "The State asserted that it had two eyewitnesses who observed Evans shoot Prince. The State hypothesized that the defense would attempt to put forth evidence of other witnesses who saw Reed with the gun immediately after the fatal shot was fired but who had not observed Reed shoot Prince with the gun. The State contended that circumstantial evidence that another had committed the murder was inadmissible absent corroborating evidence, stating that Evans had corroborating evidence if that evidence was not excluded as hearsay. The hearsay evidence the State was referring to was the testimony of a defense witness who would testify that after the shooting Reed admitted that he shot Prince and that he dumped Prince's body in the woods.
>
> "Defense counsel argued against the motion in limine, asserting that the circumstantial evidence the State sought to exclude was proper evidence for the jury to consider " *Evans*, 275 Kan. at 97.

On the first day of Evans' trial, the trial judge advised the parties that he was sustaining the State's motion, conditioned upon the State producing testimony that Evans was observed shooting at the victim. Ultimately, Evans was able to testify that, after he heard the shot, he looked up and saw Reed putting a gun down to his side. And another witness testified that Reed admitted to him and to others that he had shot Prince. Evans was not allowed to present other witnesses who would have said they also saw Reed with the gun immediately after the shot was fired. 275 Kan. at 98.

Evans argued on appeal that the district judge erred by limiting his evidence of Reed's guilt and that the interpretation of the third-party evidence rule applied in his trial was unconstitutional.

Our decision on the appeal observed that the third-party evidence rule had been correctly applied in previous cases to exclude defense evidence that someone else merely had a motive to commit the crime or that someone else merely bore a physical resemblance to a defendant. In those cases, the third-party evidence rule prevented mere speculation and conjecture. Evans' evidence, on the other hand, linked a third party to the scene of the crime holding the murder weapon immediately after the fatal shot was fired. Such evidence should not be excluded under the rule. 275 Kan. at 104-105.

Returning to first principles, we dismissed any artificial distinction between direct and circumstantial evidence:

> "This court has recognized that there is no distinction between direct and circumstantial evidence in terms of probative value. See [*State v.*] *Beard*, 273 Kan.789, Syl. ¶ 5[, 46 P.3d 1185 (2002); *State v. Scott*, 271 Kan. 103, 107, 21 P.3d 516, *cert. denied* 534 U.S. 1047 (2001); *State v. Juiliano*, 268 Kan. 89, 97, 991 P.2d 408 (1999). Additionally, it must be noted that this court has stated that a conviction for even the gravest offense may be sustained on circumstantial evidence. *State v. Sanders*, 272 Kan. 445, Syl. ¶ 5, 33 P.3d 596 (2001), *cert. denied* 536 U.S. 963 (2002); [*State v.*] *Clemons*, 251 Kan. 473, 488, 836 P.2d 1147 (1992). Circumstantial evidence

> that would be admissible and support a conviction if introduced by the State cannot be excluded by a court when offered by the defendant to prove his or her defense that another killed the victim." *Evans*, 275 Kan. at 105.

We ultimately determined, under the K.S.A. 60-261 standard, that the exclusion of the additional evidence in *Evans* could not be labeled harmless and reversed the defendant's murder conviction. This outcome on the state common-law claim eliminated the need for us to reach the constitutional question. 275 Kan. at 106.

Evans was followed by *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *rev'd and remanded* 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006), and *vacated in part* 282 Kan. 38, 144 P.3d 48 (2006). *Marsh* explicitly disapproved of the oversimplification of the third-party evidence rule in *Bornholdt* and like cases. *Marsh*, 278 Kan. at 532. It also made important points about how to approach the admissibility of third-party evidence.

Marsh first made clear that the determination of admissibility of third-party evidence starts at the same place that the question of admissibility of any evidence starts:

> "The general rule is that, unless otherwise provided by statute, constitutional prohibition, or court decision, all relevant evidence is admissible. K.S.A. 60-407(f). Relevant evidence is 'evidence having any tendency in reason to prove any material fact.' K.S.A. 60-401(b). To establish relevance, there must be some

> material or logical connection between the asserted facts and the inference or result they are designed to establish. *State v. Lumley*, 266 Kan. 939, 950-51, 976 P.2d 486 (1999). We have also recognized the 'probative values of direct and circumstantial evidence are intrinsically similar, and there is no logically sound reason for drawing a distinction as to the weight to be assigned to each.' *State v. Scott*, 271 Kan. 103, Syl. ¶ 2, 21 P.3d 516, *cert. denied* 534 U.S. 1047 (2001)." *Marsh*, 278 Kan. at 530.

Second, *Marsh* emphasized that Kansas' third-party evidence rule, as originally conceived and applied, made admission of a third party's motive alone improper.

> "[T]he so-called third party evidence rule has limited application and is most assuredly subordinate to the general rules of evidence and the statutory definition of relevancy in K.S.A. 60-401(b).

> "[W]hile evidence of the motive of a third party to commit the crime, standing alone, is not relevant, such evidence may be relevant if there is other evidence connecting the third party to the crime." 278 Kan. at 531.

Marsh explicitly set out a corollary on circumstantial evidence connecting a third party to a crime: "[Such] evidence will not be excluded merely because the State relies upon direct evidence of the defendant's guilt. In short, there is no bright line rule." 278 Kan. at 531.

And finally, *Marsh* gave direction to district court judges. "[T]here must be the sound exercise of judicial discretion dependent on the totality of facts and circumstances in a given case. This require[s] the district judge to consider whether the evidence [is] relevant under K.S.A. 60-407(f), and [] failure to do so constitutes error." 278 Kan. at 531-32.

Subsequent Kansas cases have applied the third-party evidence rule as described in *Marsh*. See *State v. Inkelaar*, 293 Kan. 414, 441, 264 P.3d 81 (2011) ("[I]n this case, none of the evidence proffered by the defense connected [the third party] to the charged crimes."); *State v. Tahah*, 293 Kan. 267, 275, 262 P.3d 1045 (2011) ("We conclude that under the totality of facts and circumstances in this case, the [third-party evidence] neither indicate[s] [the third party's] motive to commit the crimes nor otherwise connect[s] him to the murder."); *State v. Brown*, 285 Kan. at 305 ("[N]one of the evidence offered by Brown amounted to anything more than baseless innuendo. There is nothing tying these third parties to the shooting."); *State v. Adams*, 280 Kan. 494, 505, 124 P.3d 19 (2005), *disapproved on other grounds by State v. Warrior*, 294 Kan. 484, 277 P.3d 1111 (2012) ("[A] district judge must evaluate the totality of facts and circumstances in a given case to determine whether the defense's proffered evidence effectively connects the third party to the crime charged.")

These cases illustrate that neither the district judge in the first instance nor we on appeal should focus on the strength of the State's case against a defendant when deciding the relevance of any third-party evidence that he or she has offered. Relevance is a

function of whether the evidence has "any tendency in reason to prove any material fact," K.S.A. 60-401(b). The ultimate fact to be determined in any criminal trial is the defendant's guilt or innocence, and evidence having any tendency in reason to establish that material fact should be admitted regardless of its relative strength or weakness when compared to the State's case. See *State v. Krider*, 41 Kan. App. 2d 368, 376, 202 P.3d 722 (2009) ("[W]e are convinced the district court appropriately applied the [third-party evidence] rule [when it] evaluated *the totality of the defendant's proffered evidence*." [Emphasis added.]); K.S.A. 60-407(f) ("all relevant evidence is admissible"); *Krider v. Conover*, 497 Fed. Appx. 818, 822 (10th Cir. 2012), *cert. denied* 133 S. Ct. 1469 (2013) (Kansas rule consistent with United States Supreme Court rule in *Holmes v. South Carolina*, 547 U.S. 319, 327, 126 S. Ct. 1727, 164 L. Ed. 2d 503 [2006]). The fact that third-party evidence consists solely of the defendant's own testimony should make no difference. See *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) ("[T]he most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony.")

These authorities lay the foundation for our conclusion that the State led Judge Clark into error on his application of the third-party evidence rule to exclude the testimony of R. Carr about the unknown, uncharged black male with J. Carr on the night of the Birchwood crimes.

Ignoring for the moment any elements of the proffered testimony that could be subject to challenge as hearsay, as well as the merits of any such challenge, R. Carr was prepared to testify not that the unknown person had a motive but that he observed him after being summoned to a location by a distraught J. Carr, that this observation of the third person with J. Carr took place in the time frame of the crimes, that the third person possessed property belonging to the Birchwood victims, and that he was present for at least one discussion between R. Carr and J. Carr on the general subject of the temporary storage of that stolen property. He also was prepared to testify that he saw the third party drive the truck to Donley's apartment complex.

Rather than evaluating the relevance of this evidence, the record demonstrates that Judge Clark based his third-party evidence ruling entirely on a faulty comparison between the strength of the State's case, using a functionally nonexistent distinction between direct and circumstantial evidence. This was an abuse of discretion, and we decline the State's invitation in its brief to reinforce it by ruling that R. Carr's proffered evidence was irrelevant and inadmissible because it was unlikely to lead to acquittal on the Birchwood crimes. Its persuasive power or lack thereof is a reversibility consideration, not a factor in whether we hold there was error. We will turn back to the question of reversibility after discussing the secondary argument advanced in the district court for the evidence's exclusion: hearsay.

Hearsay and Its Exceptions

R. Carr argued to Judge Clark that the hearsay elements of his proffered evidence were admissible under two exceptions to the hearsay rule: declarations against interest and excited utterances. On appeal, he adds a third on out-of-court statements by codefendant J. Carr: confessions.

Before Judge Clark, the prosecutor never made a coherent legal argument in opposition to R. Carr's attempt to admit out-of-court statements by J. Carr (and probably the third party) as declarations against interest or excited utterances.

Before trial, the State's motion in limine sought to exclude only defendant's out-of-court statements, and the prosecutor said at the hearing on the motion that she was not addressing any statement to which a hearsay exception applied. The prosecutor's objection at the time of counsel Wachtel's opening statement reference to the "third black male who still walks the streets of Wichita" stated no ground for the objection, and Judge Clark merely ruled at the time that the reference was "improper" and later, "misconduct." There was no argument from either side on hearsay when Judge Clark again took up the subject of third-party evidence after the testimony of the mitochondrial DNA analyst. When R. Carr's counsel made the oral proffer, the prosecution's hearsay objections were limited to: "violative of the hearsay principles"; "inappropriate and improper"; "pure hearsay"; "hearsay evidence which the court has clearly said is unexceptional," an overstatement of Judge Clark's previous action on the issue; "hearsay evidence of an individual who's not identified"; "highly

inappropriate"; and, after Wachtel had mentioned the hearsay exceptions for statements against interest and excited utterances, "They've not identified any particular exception that [it] would clearly fall under because it doesn't." Nevertheless, Judge Clark ruled in the State's favor on the hearsay issue. He gave no explanation other than to say that any out-of-court statements covered by R. Carr's proffer offered for truth of the matter asserted "fit[] no exception . that I know of."

On appeal, the State still makes no direct effort to counter R. Carr's arguments for application of the, now, three hearsay rule exceptions. Rather, it argues that a determination that the evidence is not admissible under the third-party evidence rule is a determination that the evidence is not relevant; therefore, the hearsay argument is an attempt "to get in through the back door what the totality of the evidence demonstrates he cannot properly admit through the front." Of course, we have now decided the third-party evidence issue in a way that means the State's relevance-based argument is meritless.

Our standard of review is abuse of discretion. Again, this standard includes a review to determine that the discretion was not guided by erroneous legal conclusions. *Brown*, 285 Kan. at 294.

Our evaluation of the three hearsay exceptions argued by R. Carr is impeded by the silence of the State and Judge Clark on the governing law and by the absence of any specific articulation of the statements supposed to have been made by J. Carr (and possibly the third party) in the record. Yet the State has never challenged the sufficiency of the proffer, and we forge

ahead. See *Marsh*, 278 Kan. at 529 (in absence of challenge to proffer, issue preserved).

Declarations Against Interest

K.S.A. 60-460(j) defines a declaration against interest:

> "*Declarations against interest*. Subject to the limitations of exception (f) [concerning confessions], a statement which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected the declarant to civil or criminal liability or so far rendered invalid a claim by the declarant against another or created such risk of making the declarant an object of hatred, ridicule or social disapproval in the community that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true."

R. Carr relies primarily on *State v. Brown*, 258 Kan. 374, 904 P.2d 985 (1995), and *Chambers v. Mississippi*, 410 U.S. 284, 292, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), to support his argument.

In *Brown*, the defendant sought to introduce statements that another person made to three witnesses admitting that he, not the defendant, shot the victim. This court noted that K.S.A. 60-460(j) "includes a requirement the defendant make a showing of trustworthiness by the out-of-court declarant." 258 Kan. at 382. Quoting *State v. Jones*, 246 Kan. 214, 219, 787 P.2d 726 (1990), *Brown* recognized several factors that a district judge may consider in determining

whether a hearsay statement is admissible as a declaration against interest.

> "'A trial judge has wide discretion in determining the admissibility of a declaration against interest and may consider such factors as the nature and character of the statement, the person to whom the statement was made, the relationship between the parties, and the probable motivation of the declarant in making the statement.'" 258 Kan. at 382.

Brown also discussed *Chambers*, noting the four factors discussed in that case in determining that a third party's admissions were admissible as declarations against interest:

> "First, the admissions were made spontaneously to a close acquaintance shortly after the murder. Second, each confession was corroborated by some other evidence in the case. Third, each confession was unquestionably self-incriminatory and against interest. Finally, the third party who was said to have admitted committing the crime was present in the courtroom, had been under oath, and was available for cross-examination." 258 Kan. at 382-83.

Brown recognized that the fourth factor listed in *Chambers* is inapplicable under K.S.A. 60-460(j).

R. Carr argues that J. Carr's statements to him fall clearly within these requirements:

> "They were against his interest, as they implicated him in multiple homicides, they were

> corroborated by the DNA evidence and the physical evidence which placed Jonathan at the scene of the crime and, as they were made while the events were occurring, and immediately afterwards, were certainly spontaneous and there is no evidence of motivation to make the statements."

The material in the oral proffer that appears to quote J. Carr is limited. During the first phone call, J. Carr said that R. Carr needed to come to a location and that the third person was "'trippin' and talked about shooting people." During the second call, J. Carr said he was near Adams' house; that the third person had a gun. During the third call, J. Carr said that the third person had been "trippin'" and had shot people, that the property was stolen and people had been killed, and that J. Carr was leaving town. The proffer also indicated J. Carr's in-person presence when the stolen property was obtained by R. Carr but attributed no particular statement to J. Carr.

These statements during the telephone calls were not clear on exactly what J. Carr's role in the crimes had been, but they at least imply his presence when the crimes were committed. Viewed objectively, they made him vulnerable to at least criminal investigation, if not prosecution. See *State v. Hughes*, 286 Kan. 1010, Syl. ¶ 8, 191 P.3d 268 (2008). Subjectively, J. Carr no doubt hoped his brother would help him avoid punishment. See *State v. Cooper*, 20 Kan. App. 2d 759, 763, 892 P.2d 909 (1995); *State v. Palmer*, 8 Kan. App. 2d 1, 6, 657 P.2d 1130 (1982).

The statements, as described, appear to have been spontaneous, and J. Carr's presence at the Birchwood

home and the soccer field certainly was eventually corroborated. In short, given the mix of factors to be evaluated under *Brown* and *Chambers*, we are comfortable concluding that the J. Carr statements meet the hearsay exception for declarations against interest, and Judge Clark abused his discretion by, at a minimum, ruling otherwise prematurely.

On the unknown third person, the proffer says only that R. Carr spoke to him and, somehow, at some unspecified later point, a decision on what to do with the stolen property was arrived at by someone. No part of the proffer quotes the unidentified third person. This part of R. Carr's anticipated testimony was not hearsay at all, and the declaration against interest exception was unnecessary to make it admissible as circumstantial evidence of the central fact in this case—R. Carr's guilt or innocence.

Excited Utterances and Confessions

Because we have concluded that R. Carr's anticipated testimony about statements made by J. Carr was admissible under the declarations against interest hearsay exception, we need not reach R. Carr's alternative arguments on excited utterances under K.S.A. 60-460(d) or confessions under K.S.A. 60-460(f).

Reversibility

R. Carr argues that all of his convictions on the Birchwood crimes must be reversed, because Judge Clark's exclusion of his proffered evidence under the third-party evidence rule and as hearsay was structural error that prevented him from presenting his defense.

We first examine the nature of a criminal defendant's right to present a defense and then the possibility of a remedy for its violation.

Nature of Right to Present a Defense

Recognition of a defendant's right to present a defense can be traced to *Chambers*, in which the United States Supreme Court rejected a state's "voucher" rule, preventing a party from impeaching his own witness and its application of the hearsay rule, because their combination hamstrung a defendant's effort "to develop his defense." 410 U.S. at 296. The Court relied upon due process and the right of confrontation and the right of a defendant to present witnesses on his own behalf, concluding the combined effect of the voucher and hearsay rules denied the defendant "a trial in accord with traditional and fundamental standards of due process." 410 U.S. at 302.

Since *Chambers*, the Court has reviewed many cases in which the defendant asserted his right to present a defense was denied by a procedural rule or evidentiary ruling. Summarizing this history, the Court recently described the "right" as follows:

> "'[T]he Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense,"' *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 [1984]), but we have also recognized that "'state and federal rulemakers have broad latitude under the Constitution to establish rules

> excluding evidence from criminal trials,'" *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 [1998]). Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence. See [*Holmes*], 547 U.S., at 331, 126 S. Ct. 1727 (rule did not rationally serve any discernible purpose); *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (rule arbitrary); *Chambers v. Mississippi*, 410 U.S. 284, 302-303, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (State did not even attempt to explain the reason for its rule); *Washington v. Texas*, 388 U.S. 14, 22, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (rule could not be rationally defended)." *Nevada v. Jackson*, ___ U.S. ___, 133 S. Ct. 1990, 1992, 186 L. Ed. 2d 62 (2013).

This court also has described a defendant's right to present a defense, sometimes calling it "fundamental" and "absolute." In one of our first post-*Chambers* cases, we said:

> "The defendant's theory of defense as to why the attack occurred was excluded by the trial court. The defendant had a right to present his theory of defense. He had the right to introduce into evidence what he believed was the motive and intent by the deceased for what he claimed was an attack by the deceased upon his person. This was an integral part of his claim of self-defense or justifiable homicide. It is fundamental to a

> fair trial to allow the accused to present his version of the events so that the jury may properly weigh the evidence and reach its verdict. The right to present one's theory of defense is absolute. The trial court improperly used the evidentiary rules of establishing character to exclude relevant and material information pertaining to the defense." *State v. Bradley*, 223 Kan. 710, 713-14, 576 P.2d 647 (1978).

See *State v. Rowell*, 256 Kan. 200, 209, 883 P.2d 1184 (1994), *abrogated on other grounds by Shadden*, 290 Kan. 803, 235 P.3d 436 (2010) (right to present theory of defense "absolute"); *State v. Mays*, 254 Kan. 479, 487, 866 P.2d 1037 (1994) (same); *State v. Irons*, 250 Kan. 302, Syl. ¶ 2, 827 P.2d 722 (1992).

In other cases, we have not used the same categorical terms:

> "A defendant must be permitted to present a complete defense in a meaningful manner, and exclusion of evidence which is an integral part of a defendant's theory violates the right to a fair trial. However, a defendant's right to call and examine witnesses is not absolute and on occasion will be overridden by 'other legitimate interests in the criminal trial process.' *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)." *State v. Green*, 254 Kan. 669, 675, 867 P.2d 366 (1994).

Most recently, we said this about the right:

> "Under the state and federal constitutions, a defendant is entitled to present his or her theory

> of defense. But the right to present a defense is not absolute. Instead, the right is subject to statutory rules and caselaw interpretations of the rules of evidence and procedure." *State v. Astorga*, 295 Kan. 339, Syl. ¶ 2, 284 P.3d 279 (2012), *cert. granted, judgment vacated on other grounds* 133 S. Ct. 2877 (2013).

When all of these authorities are laid side to side, our court's description of the right to present a defense from *State v. Green*, 254 Kan. 669, Syl. ¶ 2, 867 P.2d 336 (1994), seems closest to the position taken by the United States Supreme Court. The right is fundamental but its protection tempered by sensible control of the criminal trial process. A defendant is entitled to a "meaningful opportunity to present a complete defense," but the right is subject to procedural rules and evidentiary rulings that serve legitimate interests. See, *e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (rule under consideration did not rationally serve any legitimate interest); but see *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) ("[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible."). The right, a critical component of a fair trial, is violated when a district judge excludes relevant, admissible, noncumulative evidence that is an integral part of a defendant's theory of defense. *State v. King*, 293 Kan. 1057, 1063, 274 P.3d 599 (2012) (proffered testimony of defense witnesses tending to establish bias, interest, improper motives of arresting officer admissible as integral part of defense); *State v. Houston*, 289 Kan. 252, 261, 213 P.3d 728 (2009) (exclusion of evidence of victim's prior violence

toward defendant's family members not error because not relevant to self-defense theory); *State v. Cooperwood,* 282 Kan. 572, Syl. ¶ 1, 147 P.3d 125 (2006) (expert opinion testimony on effectiveness of victim's antihallucination medication relevant to defense theory, exclusion not error because not necessary for jury understanding of defense); *State v. Lawrence,* 281 Kan. 1081, Syl. ¶ 1, 135 P.3d 1211 (2006) (trial court rulings on evidence of effect of prior shooting on defendant's state of mind not unconstitutional limit on presentation of imperfect self-defense theory).

We have already determined that R. Carr's proffered evidence was relevant and admissible. It was not merely integral to his defense; it was his defense. *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (defendant's testimony may be indispensable). The State has not argued, and we do not divine, how either the third-party evidence rule, as understood and applied by Judge Clark, or the judge's refusal to apply the hearsay exception for declarations against interest was supported by a legitimate interest sufficient to overcome R. Carr's right to present his defense.

Remedy for Violation

R. Carr urges us to treat the violation of his right to present a defense—particularly given its effective preclusion of his ability to testify to anything useful to the defense—as structural error that is automatically reversible.

R. Carr cites a single case from the Supreme Court of Louisiana to support his argument, *State v.*

Hampton, 818 So. 2d 720 (La. 2002). *Hampton* is too different from R. Carr's situation to have much persuasive punch. In it, the defendant had told his counsel continuously that he wanted to testify; counsel responded that it was not the defendant's decision to make. Here, the record before us indicates that R. Carr decided not to testify after consulting with counsel in the wake of the judge's rulings.

In addition, although the United States Supreme Court has not ruled on the issue, it appears the majority of courts that have considered the issue have applied a constitutional harmless error standard to denial of a defendant's right to testify. See *Palmer v. Hendricks*, 592 F.3d 386, 398 (3d Cir. 2010); *Ortega v. O'Leary*, 843 F.2d 258 (7th Cir. 1988); *Wright v. Estelle*, 572 F.2d 1071 (5th Cir. 1978); *Quarels v. Com.*, 142 S.W.3d 73 (Ky. 2004).

The United States Supreme Court has held that denial of a defendant's right to present a defense is subject to the constitutional harmlessness standard. See *Crane v. Kentucky*, 476 U.S. 683, 691, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

Under the constitutional harmlessness standard, again, we must be persuaded beyond a reasonable doubt that there was no impact on the trial's outcome, *i.e.*, there is no reasonable possibility that the error contributed to the verdict. *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011).

The State, as the party benefitting from the alleged error, must demonstrate harmlessness. It summarizes the evidence against R. Carr on the Birchwood crimes in its brief:

"[Holly G.'s] identification of Reginald, both immediately following the attack and at trial, as one of the two black males responsible for the crimes perpetrated against her and her friends. [Holly G.'s] identification was buttressed by multiple scientific sources, including the mitochondrial DNA analysis, which revealed that of the four hairs collected from the Birchwood scene and submitted for analysis only two were of African-American lineage and defendant could not be excluded as the donor of either one; the nuclear DNA test results, which demonstrated defendant also could not be excluded as the donor of the DNA evidence recovered from [Holly G.'s] inner thigh and which identified the blood on defendant's shirt and underwear as that of [Heather M.]; and the medical evidence, which demonstrated that a few short months after the attack [Holly G.] developed the same sexually transmitted disease that defendant carried."

"Additional evidence to support the identification included footwear impressions taken from a Voicestream box and tarp at the Birchwood residence and determined to match the size, shape, and character of the 'B-Boots' Reginald wore. A cigar-type ash, matched the diameter of the cigar recovered from Reginald's coat pocket. Both pieces of evidence supported [Holly G.'s] assertion that Reginald played an active role in the commission of the offenses.

"Further, the court heard evidence that it was Reginald who was in possession of a vast majority of the property taken from the Birchwood residence, given that it was recovered from both the apartment where he was staying and his Plymouth vehicle. That property included a big screen TV, various electronics, bedding, luggage, a vast amount of clothing, and numerous personal items belonging to each victim—including checkbooks, wallets, credit cards, drivers' licenses, sets of keys, gas cards, watches, and day planners—as well as numerous ATM receipts and just under $1000.00 in cash, a particularly notable fact given that Reginald was unemployed. Moreover, Reginald was stopped by law enforcement officers after driving by the Birchwood residence at approximately 4:00 a.m. on the morning of the killings.

"Finally, at the time of the proffer the court was aware of the evidence that highlighted Reginald's link to the Lorcin handgun used in the commission of the murders and that, despite his efforts to dispose of the gun, it was ultimately recovered and tested, revealing that each bullet and cartridge was fired from that gun."

Given the remarkable strength of the State's case against R. Carr, we are persuaded beyond a reasonable doubt that there was no impact on the trial's outcome from the exclusion of R. Carr's proffered testimony.

19. ADMISSION OF MITOCHONDRIAL DNA EVIDENCE

R. Carr argues on appeal that Judge Clark erred in admitting mitochondrial DNA test results on hairs found at the Birchwood home.

Two of four hairs collected from the Birchwood home by investigators had a mitochondrial DNA sequence matching both defendants. Expert testimony at trial established that persons who share a mother, such as R. Carr and J. Carr, would have the same mitochondrial DNA sequence. One of the two hairs, which included root material, was submitted for more precise nuclear DNA testing. R. Carr was excluded as a possible source of that hair, but J. Carr could not be excluded.

R. Carr filed a motion to exclude evidence of the results of the mitochondrial DNA testing pretrial and again objected to admission of the evidence during trial.

R. Carr argues on appeal that the results of the mitochondrial testing were more prejudicial than probative, that he should not be convicted merely because more precise nuclear DNA testing proved J. Carr's presence at the crime scene, and that the mitochondrial test results could not measure up to a heightened scrutiny or reliability standard applicable in death penalty cases.

Standards of Review and Admissibility of Evidence

Appellate review of a district judge's decision to admit or exclude evidence involves a multistep analysis. *State v. Everett*, 296 Kan. 1039, 1044, 297

P.3d 292 (2013) (citing *State v. Shadden*, 290 Kan. 803, 817, 235 P.3d 436 [2010]).

First, an appellate court determines whether the evidence is relevant.

> "Evidence is relevant when it has 'any tendency in reason to prove any material fact.' K.S.A. 60-401(b). Accordingly, relevant evidence must be both probative and material. *State v. Martinez*, 290 Kan. 992, 1009, 236 P.3d 481 (2010) (citing *State v. Dixon*, 289 Kan. 46, 69, 209 P.3d 675 [2009]). Whether evidence is probative is reviewed under an abuse of discretion standard; materiality is judged under a de novo standard. *Shadden*, 290 Kan. at 817, 235 P.3d 436 (citing *State v. Reid*, 286 Kan. 494, 507-09, 186 P.3d 713 [2008])." *State v. Bridges*, 297 Kan. 989, 995-96, 306 P.3d 244 (2013).

Under the second step, the appellate court reviews de novo the district judge's conclusion on which rules of evidence or other legal principles apply. *Shadden*, 290 Kan. at 817.

On the third step, this court reviews the district judge's application of the rule or principle either for abuse of discretion or de novo, depending on the rule or principle being applied. 290 Kan. at 817. Admission of scientific or experimental test results such as the mitochondrial DNA testing performed on the two hairs here is reviewed for abuse of discretion. *State v. Pennington*, 254 Kan. 757, 759, 869 P.2d 624 (1994).

In addition, "a judge may, in his or her discretion, exclude otherwise admissible evidence if its probative value is substantially outweighed by the risk that its

admission will unfairly prejudice the party against whom it is offered." *State v. Smith*, 296 Kan. 111, 123, 293 P.3d 669 (2012) (citing K.S.A. 60-445; *State v. Leitner*, 272 Kan. 398, 415, 34 P.3d 42 [2001]); see *State v. Marks*, 297 Kan. 131, Syl. ¶ 5, 298 P.3d 1102 (2013) ("It is within a trial court's discretion whether to exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice.").

In *State v. Miller*, 284 Kan. 682, 690-91, 163 P.3d 267 (2007), this court explained that

> "the admission or exclusion of evidence lies within the sound discretion of the trial court. If the trial court determines the probative value of the evidence offered is substantially outweighed by the risk of unfair prejudice, the court may exclude relevant evidence. *State v. Leitner*, 272 Kan. 398, 415, 34 P.3d 42 (2001).
>
> "At the same time, the law in this state favors the admission of otherwise relevant evidence. [Citations omitted.] The Court of Appeals for the Tenth Circuit has explained with regard to Rule 403 of the Federal Rules of Evidence (which has similar language to K.S.A. 60-445 and that used in *Leitner*, 272 Kan. at 415) that '[t]he exclusion of relevant evidence under Rule 403 is "an extraordinary remedy to be used sparingly."' *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985) (*quoting United States v. Plotke*, 725 F.2d 1303, 1308 [11th Cir.], *cert. denied* 469 U.S. 843 [1984])."

Analysis

The first step of the evidentiary analysis requires this court to determine whether the mitochondrial DNA evidence is relevant, *i.e.*, both material and probative. "Material evidence tends to establish a fact that is at issue and significant under the substantive law of the case. [Citation omitted.] On the other hand, probative evidence only requires a logical connection between the asserted facts and the inferences they are intended to establish. [Citation omitted.]" *Bridges*, 297 Kan. at 999.

R. Carr makes an unconvincing argument that the evidence of the mitochondrial DNA test results on the two hairs was irrelevant. The identity of the perpetrators of the Birchwood crimes was material and in issue. And the mitochondrial DNA sequence in the two hairs had a logical connection to the material fact of identity. There was no other explanation for R. Carr's presence in the home, and the evidence was certainly admissible.

R. Carr's central argument is that Judge Clark should have intervened to keep the probative value of the mitochondrial DNA evidence from being substantially outweighed by the risk of undue prejudice from its admission. He insists that the expert testimony about him not being excluded as the contributor of one of the hairs was "meaningless, as it was conclusively shown that [J. Carr] was at the crime scene, and, in fact, left one of the two hairs." R. Carr says that admission of the mitochondrial DNA evidence, "in the context of this fact scenario, [was] dangerously misleading, as it was much more likely that hair came from [J. Carr] as well."

Although it is true that J. Carr was linked to one of the hairs by more precise DNA testing that eliminated R. Carr as the source of that hair, R. Carr was not excluded as a contributor of the other hair. This evidence that he could not be excluded through mitochondrial DNA testing was not meaningless, because it narrowed the class of individuals who had been present at the crime scene. The relevant comparison is not to other evidence implicating J. Carr but to the absence of evidence implicating anyone not in the Carrs' maternal line of descent.

Moreover, in an attempt to show that probative value was substantially outweighed by risk of unfair prejudice, R. Carr overstates the risk of juror confusion. During direct examination, the expert was very clear that all maternal relatives would have the same mitochondrial DNA profile and that mitochondrial DNA is not a "unique identifier." The expert never suggested that the mitochondrial testing identified who contributed the hair, and she admitted that nuclear DNA testing was a "more discriminatory test" and could distinguish between individuals who have the same mother. On cross-examination of the expert, R. Carr's counsel inquired about the "disadvantages" of mitochondrial DNA testing compared to nuclear DNA testing. The expert agreed that it would not tell her whether either hair belonged to R. Carr, J. Carr, their mother, or any other maternal relative. R. Carr's counsel also succeeded in demonstrating during cross-examination of the analyst who conducted nuclear DNA testing on the hair with the root that it did not come from R. Carr.

The bottom line is that R. Carr's arguments on the existence of an imbalance between probative value and undue prejudice are without merit. The mitochondrial DNA test evidence was admissible and any of its shortcomings when compared with nuclear DNA test evidence was fully explained to prevent juror confusion.

We also reject R. Carr's arguments that he should not have been convicted because more precise nuclear DNA testing had already proved the presence of a maternal relative, J. Carr, at the crime scene, and because the prejudicial nature of the mitochondrial test results could not measure up to a heightened standard of reliability required of the procedures by which a state imposes a death sentence. See *Caldwell v. Mississippi,* 472 U.S. 320, 340, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) and *Ford v. Wainwright,* 477 U.S. 399, 411, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

The mountain of evidence against R. Carr included an eyewitness identification by a victim who was able to observe him off and on for several hours; his stop by the police in the Birchwood area very shortly after the home invasion and murders were reported; and the discovery of numerous possessions of the Birchwood victims in or recently in his possession when he was arrested early on December 15, 2000. His view that he was convicted of the Birchwood crimes on the strength of mitochondrial DNA evidence from one hair is completely implausible. Any weaknesses in the evidence were fully vetted at trial, properly attacking weight rather than admissibility, and did not completely undermine that admissibility under any heightened standard of reliability applicable to capital cases.

20. Denial of Mistrial after Admission of Warts and HPV Evidence

R. Carr argues that Judge Clark erred by refusing to grant a mistrial after the admission of testimony from Holly G. that she had received a diagnosis of HPV after she was raped.

Additional Factual and Procedural Background

Before trial, R. Carr sought medical records for Holly G., and the prosecution discussed the obligation to produce such records with her. Holly G. did not disclose records in response.

At trial, both R. Carr's girlfriend, Donley, and a detective who observed R. Carr during booking testified during cross-examination by R. Carr's counsel that they had seen genital warts or lesions on R. Carr's body. When Holly G. heard this testimony from the detective, she informed prosecutors that she had learned after she was raped that she had HPV. the virus that causes genital warts or lesions.

After Holly G. informed the State of her diagnosis, the State immediately disclosed the new information to defense counsel. The State recalled Holly G. to testify, and she said that she received the diagnosis of HPV from her family doctor several months after she was raped at the Birchwood triplex.

Counsel for R. Carr did not object to this testimony and did not cross-examine, but he moved for mistrial because of the failure to disclose the HPV diagnosis before he had elicited the detective's testimony on cross-examination. Counsel argued that Holly G.'s

testimony "should [not] have been allowed because we had specifically requested the information."

Judge Clark denied the motion for mistrial, stating:

> "Let's find that it was discoverable. . I'll treat [the defense objection] as if it were contemporaneous under the theory that it could be cured with an instruction. I'll find that there is no fault as the District Attorney did not know it, nobody, even law enforcement, knew it until the cross-examination of [the detective] . And then the witness H.G. made known her medical condition.
>
> "The objection to it is overruled. I will allow it to stand but make the record clear that it's something that's been raised and objected to on the basis of it is—well, it doesn't even rise to the level of excusable neglect. It's just purely something that couldn't have been discovered under any way that I know of by the District Attorney."

Standards of Review

We review a district judge's denial of a motion for mistrial for an abuse of discretion. *State v. Waller*, No. 106,102, 299 Kan. __, __ P. 3d __ (filed June 6, 2014). "'[T]he party alleging the abuse bears the burden of proving that his or her substantial rights to a fair trial were prejudiced.' *State v. Angelo,* 287 Kan. 262, 283, Syl. ¶ 16, 197 P.3d 337 (2008) (citing *State v. White,* 284 Kan. 333, 161 P.3d 208 [2007])." *State v. Leaper*, 291 Kan. 89, 96-97, 238 P.3d 266 (2010). We first ask whether the district judge abused his or her discretion when deciding whether there was a

fundamental failure in the proceedings. If so, we then examine whether the district judge abused his or her discretion when deciding whether the problematic conduct resulted in prejudice that could not be cured or mitigated through jury admonition or instruction, resulting in an injustice. *State v. Harris*, 293 Kan. 798, 814-15, 269 P.3d 820 (2012).

Abuse of discretion is also the governing standard of review when we evaluate a district judge's decision on whether to admit or exclude evidence as a sanction for violation of a discovery order. See *State v. Bridges*, 297 Kan. at 998; *State v. Johnson*, 286 Kan. 824, 832, 190 P.3d 207 (2008). We have said that there is no due process right to have testimony excluded when a witness or party violates a discovery order, because K.S.A. 22-3212(g) grants discretion to a district judge to determine a "just sanction" for the violation. *Johnson*, 286 Kan. at 832.

Discovery Violation

R. Carr frames the issue before us as one involving a discovery violation that resulted in admission of evidence causing unfair and harmful surprise, the consequence of which should have been the requested mistrial. We therefore begin our analysis by examining whether Judge Clark erred in his implicit ruling that there was no discovery violation. If this decision was based on an error of law, then Judge Clark abused his discretion by failing to exercise it properly. See *State v. Ward*, 292 Kan. 541, 570, 256 P.3d 801 (2011) (citing *State v. Gonzalez*, 290 Kan 747, 755-56, 234 P.3d 1 [2010]).

When a criminal case is filed, a prosecutor is required to "endorse the names of all witnesses known" on the charging document. K.S.A. 22-3201(g). At later times prescribed by the court, a prosecutor may endorse additional witnesses that have become known. K.S.A. 22-3201(g). "The purpose of the endorsement requirement is to prevent surprise to the defendant and to give the defendant an opportunity to interview and examine the witnesses for the prosecution in advance of trial." *State v. Shelby*, 277 Kan. 668, 674, 89 P.3d 558 (2004).

In addition, K.S.A. 22-3212(a) requires that a prosecutor, upon request, provide the defendant with, among other things, the results of medical reports and scientific tests or experiments made in connection with the case. K.S.A. 22-3212(b) requires a prosecutor, upon request, to provide the defendant with access to documents material to the case that are in the possession of the prosecutor.

After initial compliance with a discovery order, if a party discovers additional material responsive to a previous request, "the party shall promptly notify the other party or the party's attorney or the court of the existence of the additional material." K.S.A. 22-3212(g). If a party fails to comply with this obligation, the court "may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." K.S.A. 22-3212(g).

In addition to these and other statutory discovery requirements, "'"[p]rosecutors are under a positive

duty, independent of court order, to disclose exculpatory evidence to a defendant." *State v. Carmichael,* 240 Kan. 149, 152, 727 P.2d 918 (1986).' [*State v. Aikins*,] 261 Kan. [346,] 381[, 932 P.2d 408 (1997)]." *State v. Francis*, 282 Kan. 120, 150, 145 P.3d 48 (2006). This duty was first articulated by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). The duty does not extend to inculpatory evidence. *State v. McIntyre*, 259 Kan. 488, 497, 912 P.2d 156 (1996).

In this particular case, R. Carr asked the State pretrial for any follow-up medical records for Holly G. Prosecutors attempted to comply by talking to Holly G., but she failed to disclose the existence of any such records or the information they would contain. When prosecutors learned during trial about Holly G.'s HPV diagnosis, they complied with K.S.A. 22-3212(g) immediately by sharing the new information with opposing counsel and the judge. The information, given the testimony of Donley and the detective about R. Carr's genital warts or lesions, was inculpatory rather than exculpatory.

R. Carr does not allege that the State is responsible for Holly G.'s discovery violation based on her mistaken belief that the follow-up diagnosis contained "private, confidential information." And we see no discovery violation by the prosecutors. Judge Clark did not abuse his discretion in deciding as much.

Fundamental Failure

We also see no abuse of discretion in Judge Clark's implicit decision that there was no fundamental failure in the proceedings.

R. Carr's reliance on *State v. Lewis*, 238 Kan. 94, 708 P.2d 196 (1985), does not persuade us that Judge Clark should have recognized a fundamental failure here. *Lewis* was a much more extreme case, involving prosecutorial misconduct in failure to disclose a critical piece of evidence, blood on a knife, about which the defense had been misled until late in the trial. Defendants had used the absence of blood as a lynchpin of their theory of the case, claiming that the victim's wounds came from broken glass rather than their knife attack. 238 Kan. at 95-96.

We simply are not faced with a situation where R. Carr's identification as one of the men who raped Holly G. rose and fell on the circumstantial evidence of his visible genital warts or lesions and her later HPV diagnosis. Holly G. identified R. Carr directly as the second intruder at the Birchwood home. Any causal relationship between HPV and the genital warts or lesions observed on R. Carr was merely corroboration of what was no doubt compelling testimony from a woman who said she was sexually victimized repeatedly over several hours by R. Carr and his brother.

Having concluded that Judge Clark did not abuse his discretion by failing to recognize a fundamental failure in the proceedings, we need not reach the further question of whether measures other than mistrial could have cured such a failure.

21. Felony Murder as Lesser Included Offense of Capital Murder

R. Carr argued in his original brief to this court that Judge Clark erred by failing to give a requested

instruction on felony murder as a lesser included offense of capital murder. In view of an intervening statutory change specifically eliminating felony murder as a lesser included offense of capital murder, see K.S.A. 2013 Supp. 21-5402(d), the parties also now debate whether the new statutory language can be applied constitutionally to the defendants.

Additional Factual and Procedural Background

Both defendants requested an instruction on felony murder as a lesser included offense of capital murder. Judge Clark agreed with the State that the facts of the case did not support a felony murder instruction. He did give lesser included offense instructions on first-degree premeditated murder and second-degree intentional murder.

The Developing Law

In *State v. Cheever*, 295 Kan. 229, 284 P.3d 1007 (2012), *vacated and remanded on other grounds*, 134 S. Ct. 596 (2013), this court held, 11 years after trial of this case, that felony murder was a lesser included offense of capital murder and that an instruction should be given in any capital case where felony murder was supported by the evidence. 295 Kan. at 259.

After *Cheever*, the 2013 legislature passed Senate Substitute for House Bill 2093, effective July 1, 2013, (L. 2013, ch. 96, sec. 2) which amended the definition of murder in the first degree to provide that felony murder was not a lesser included offense of capital murder. See K.S.A. 2013 Supp. 21-5402(d). The amendment explicitly provided that it was to be applied retroactively to cases such as this. We ordered

additional briefing on retroactive effect of this amendment from the parties.

Both defendants have argued that application of the amended statute to them to preclude a lesser included offense of felony murder would violate their Eighth Amendment and Fourteenth Amendment due process rights recognized by *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Both also argue that application of the amendment to them would violate the Ex Post Facto Clause of the United States Constitution.

A challenge to the constitutionality of a statute raises a question of law subject to our unlimited review. *State v. Cook*, 286 Kan. 766, 768, 187 P.3d 1283 (2008).

In *State v. Gleason*, No. 97,296, 299 Kan. ___, Syl. ¶ 9, ___ P.3d ___ (filed July 18, 2014), we rejected the due process and ex post facto arguments advanced by the defense in this case. The amended statute abolishing felony murder as a lesser included offense of capital murder can be constitutionally applied to the defendants in this case.

This ruling eliminates any need for us to address the argument from the defense that a lesser included instruction on felony murder was supported by the evidence admitted at trial.

22. Exclusion of Expert on Eyewitness Identification

R. Carr argues that his convictions must be reversed because Judge Clark denied defense motions

to admit expert testimony by Scott Fraser on the reliability of eyewitness identification.

Additional Factual and Procedural Background

The defense made a written proffer of Fraser's anticipated testimony. The proffer stated that the testimony was intended to "aid the trier of fact in evaluating eyewitness recognition evidence." It continued:

> "[T]he proposed testimony, by providing the jury with scientific findings predicated upon empirical studies about eyewitness recognition, will aid the jury's evaluation of that evidence
> "
>
> "The following is a summary of the potential topics
>
> "1. Memory Decay—The rapidity of memory decay is much more significant than is commonly known. Instead of days or weeks, a substantial decline in a subject's ability to accurately recall details occurs within hours. Dr. Fraser would testify that the scientific conclusions concerning memory decay are beyond the realm of a typical juror's knowledge.
>
> "2. Primacy of Opportunity for Identification—The earliest reliable test of a subject's ability to select or reject a suspect has the highest degree of accuracy. Dr. Fraser would testify that scientific conclusions concerning the earliest test of recognition are not generally known.

"3. Own Race Effect—The accuracy of selections where the victim is of a different race than the perpetrator is significantly less than where the victim and the perpetrator are of the same race. Dr. Fraser would testify that the available empirical evidence concerning this effect is not generally known to the average juror.

"4. Relative Reliability of Selections and Rejections—Rejections (non-selections) in recognition tests, like photographic lineups, are just as reliable as selections. Each should be accorded equal weight in terms of accuracy, authenticity, and information about a victim's memory. Dr. Fraser would testify that the relative validity of recognition test decisions is not generally known.

"5. Confidence—Contrary to common beliefs, a witness' confidence in a selection is not strongly related to the accuracy of that selection.

"6. Post-Event Information—Information gathered after the event, from newspapers, television, or other sources, alters the subject's memory of the episode without the subject's awareness. This phenomenon, as Dr. Fraser would testify, is beyond the ken of the average juror."

At a hearing on the defendants' motions, the State argued that the evidence invaded the province of the jury; the evidence would not be helpful to the jury; and the PIK instruction on eyewitness identification provided adequate safeguards.

Relying on *State v. Gaines*, 260 Kan. 752, 763, 926 P.2d 641 (1996) (expert testimony regarding eyewitness identification should not be admitted), Judge Clark denied the motion.

Continued Viability of Gaines

On appeal, R. Carr and J. Carr argue that *Gaines* was wrongly decided.

The State cites *State v. Schwarm*, 271 Kan. 155, 164, 21 P.3d 990 (2001) (admissibility of expert testimony lies within sound discretion of trial court), to support its argument that the standard of review on this issue is abuse of discretion. The defense acknowledges this general standard on admission of expert testimony, but it contends that the issue of whether *Gaines* is still good law in Kansas warrants de novo review. See *State v. Jefferson*, 287 Kan. 28, 33-34, 194 P.3d 557 (2008).

Both parties are correct. The continuing viability of an earlier holding is a question of law over which we exercise unlimited review. But, once the legal standard is established, we review a decision to admit or exclude expert testimony for abuse of discretion. An abuse of discretion may arise through a failure to understand or apply the correct legal standard. See *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011) (citing *State v. Gonzalez*, 290 Kan. 747, 755-56, 234 P.3d 1 [2010]), *cert. denied* 132 S. Ct. 1594 (2012).

In Kansas, we have long held that expert testimony on the reliability of eyewitness identification should not be admitted at trial. *Gaines*, 260 Kan. at 763. This has been true, despite our recognition of problems inherent in the area of eyewitness identification. See *State v.*

Mitchell, 294 Kan. 469, 474, 275 P.3d 905 (2012) ("eyewitness identifications can be unreliable and result in wrongful convictions, causing some of the most tragic miscarriages of justice"); *State v. Warren*, 230 Kan. 385, 390-91, 635 P.2d 1236 (1981) ("problem of the potential unreliability of eyewitness identification has been with us for a long time"). We have steadfastly resisted admission of expert testimony on the subject, asserting that admission of expert evidence on "'the reliability of eyewitness testimony is not the answer to the problems surrounding eyewitness identifications.'" *Gaines*, 260 Kan. at 763 (quoting *State v. Wheaton*, 240 Kan. 345, 352, 729 P.2d 1183 [1986]); see also *State v. Reed*, 226 Kan. 519, 522, 601 P.2d 1125 (1979) (such testimony invades field of common knowledge, experience, education of laymen). We have relied on cross-examination, persuasive argument, and a cautionary instruction to provide safeguards against unreliable eyewitness identifications. See *Mitchell*, 294 Kan. at 474; *Warren*, 230 Kan. at 393.

The defendants attack the rationale underlying our precedent and note that several state and federal jurisdictions have recently rejected it. See, *e.g.*, *State v. Clopten*, 2009 UT 84, 223 P.3d 1103, 1108 (Utah 2009) ("little doubt" juries generally unaware of deficiencies in human perception, memory, thus give great weight to eyewitness identifications; shortcomings of cross-examination, cautionary instruction as safeguards considered; caselaw excluding expert testimony overturned). Jurisdictions nationwide are split. Compare, *e.g.*, *State v. Guilbert*, 306 Conn. 218, 251, 49 A.3d 705 (2012) (reliability of eyewitness identification not matter within knowledge of average juror; expert testimony admissible), with, *e.g.*, *State v.*

Young, 35 So. 3d 1042, 1050 (La. 2010) (expert testimony inadmissible; recognizing debate).

Two years ago, we changed course on another aspect of eyewitness identification evidence, specifically, on the instruction that directs juries to evaluate it especially carefully. In *Mitchell*, we held that the traditional PIK cautionary instruction on the reliability of eyewitness identifications must be responsive to developing research and thus stop listing the witness' degree of certainty as a factor to be evaluated. We were mindful that the instruction had the potential to assign more weight to an expression of certainty than modern scholarship would. We quoted cases from other jurisdictions in which studies on the correlation between eyewitness certainty and accuracy had been discussed, and we ultimately determined that "the available studies are not definitive on the question whether there is a significant correlation between certainty and accuracy." 294 Kan. at 481.

We conclude today that Kansas should evolve in a like manner on the subject of the potential contribution expert testimony can make when juries decide the reliability of an eyewitness identification.

At this juncture, with a deeper appreciation of all that we and the average juror do not know, we have little question that the subjects Fraser intended to address are outside the usual knowledge of persons without his education and experience. See *State v. Willis*, 240 Kan. 580, 585-86, 731 P.2d 287 (1987) (when defendant seeks addition of factors to eyewitness cautionary instruction, including cross-racial identification, unconscious transference, after-acquired experience, court concludes terms beyond ordinary lay

person's knowledge, experience; inclusion of factors would require expert testimony to support it); see also Kohnken and Maass, *Eyewitness Identification: Simulating the "Weapon Effect,"* Law and Human Behavior, Vol. 13, No. 4 (1989) (only half of judges, jurors surveyed believed perpetrator's use of a weapon had debilitating effect on eyewitness recognition; 88 percent of expert psychologists appreciated weapon's influence on identification). Although many of us are aware of the general fallibility of human memory, we are not well versed in its scientifically documented tendencies to decay or become polluted by outside information and influences over time. We have not read widely and deeply on whether a certain degree of skepticism should accompany our examination of a witness' identification of a person of a different race, but this subject is of legitimate concern when, as here, the victims in all three incidents were white and the defendants black. Neither the court nor laypeople generally are likely to be aware of expert arguments that a failure to identify can be just as significant as an identification. Again, this topic may have had specific bite in this case, notable for the State's extensive reliance on three victims' identifications of at least one of the two defendants; because there also were failures to identify. Schreiber did not identify either defendant in a photo array; Walenta did not identify J. Carr in a photo array; Holly G. did not identify J. Carr in a photo array, and she did not identify R. Carr at preliminary hearing.

Of course, had Fraser been permitted to testify, all of his testimony on these subjects would have been subject to the crucible of cross-examination, as well as probable examination by competing experts. There is

no reason to suspect that our truth-finding system would have collapsed. The State would have been free to present its version of the authorities on which Fraser relied, and a better-educated jury would still have been free to accept or reject Fraser's opinions.

The time has come to eschew *Gaines*' automatic rule of exclusion in favor a more flexible approach—individual evaluation by the judge in each case whether proffered expert testimony on the reliability of eyewitness identifications will be helpful to the jury—and whether it meets any other applicable test for admission of expert evidence. See *United States v. Brien*, 59 F.3d 274, 277 (1995) (unwilling to adopt blanket rule on admissibility of expert testimony of eyewitness reliability). We do not pass today on the outcome that should be reached in any particular case. We simply alter the map for reaching it.

We conclude that automatic exclusion of Fraser's testimony rested on legal error, which means the judge's decision qualified as an abuse of discretion. See *Ward*, 292 Kan. at 550 (citing *Gonzalez*, 290 Kan. at 755-56).

Harmlessness

Having concluded there was error in automatically excluding Fraser's testimony under *Gaines*, we turn to whether its omission requires reversal of the defendant's convictions, the evidence for all of which included eyewitness identifications. See K.S.A. 60-261; *State v. Herbel*, 296 Kan. 1101, 1110, 299 P.3d 292 (2013) (quoting *Ward*, 292 Kan. 541, Syl. ¶ 6).

Given the hours Holly G. was in the presence of the two intruders—at the Birchwood home, on her trip

with the second intruder to the ATM, and en route to the soccer field—we cannot be persuaded that the exclusion of Fraser's evidence about the subjects listed in the proffer affected the outcome of the trial on any of the Birchwood crimes. Although we are somewhat less sanguine on the Schreiber crime and Walenta crimes, the commonalities of the gun and various elements of the modus operandi of the perpetrators of those crimes and the Birchwood crimes also mean we cannot be persuaded that admission of Fraser's evidence would have made a difference for R. Carr.

23. JURY VIEW OF LOCATIONS REFERENCED AT TRIAL

R. Carr challenges Judge Clark's decision to permit a jury view of more than 20 different locations in Wichita, pursuant to K.S.A. 22-3418. He argues that the jury view violated his right to be present at all critical stages of his trial, his right to the assistance of counsel, and his right to a public trial.

Additional Factual and Procedural Background

The State filed a pretrial motion pursuant to K.S.A. 22-3418 requesting the jury view. Each of the more than 20 locations to be viewed was associated in some way with the Schreiber, Walenta, and Birchwood incidents. The prosecutor said that the view would allow jurors to "recall the evidence that they heard [in court] and associate it with the various places involved."

R. Carr's counsel objected and said, "I fear that the view will become the evidence as opposed to the evidence being that which has been here in court." J. Carr's counsel also objected and said that the view

would be "very dangerous to everybody's shot at a fair trial."

Judge Clark granted the State's motion.

J. Carr's counsel then asked whether the defendants and counsel would be allowed to accompany the jury when it visited the different locations. Judge Clark declined to answer the question at that time, but said, "[I]f I had to decide right now the answer [would be] no."

Near the end of the State's case-in-chief, the district court judge discussed the jury view procedures with counsel.

> "Now, at some point we're going to have a jury view. This is the way it's going to be done. The jury's going to be all together in the custody of the bailiff on a conveyance. There's going to be a driver and a deputy sheriff on that conveyance as well. The role of the driver is obvious. The deputy sheriff's role will be to assist the bailiff. There will be no talk of the case by anybody. There will be marked law enforcement vehicles that will lead the conveyance and trail the conveyance. The head of the trial security, Sergeant Cliff Miller, will follow the route directed by me. He will be in the lead car and the jury conveyance vehicle will follow that lead car. Any other marked units will follow for security and to help with traffic.
>
> "The jury will receive an admonition before they leave from me that will be along this line, that any decision that you jurors make in this case must be based on the evidence admitted in

> court, viewed in light of the law that I say must be applied to the evidence. You're going to be taken for a view of certain locations that have been discussed and/or depicted by photographs in the case. The purpose of this jury view is to assist you in understanding the evidence presented in court. During the view do not discuss the case, do not allow any person to discuss the case with you, be alert to your surroundings during the trip, you may take your notebooks with you. And you all have the route, I've given you copies."

R. Carr's counsel renewed his earlier objection to the view, and J. Carr's counsel again asked whether the defendants and counsel would be allowed to be present during the jury view. In response, Judge Clark said:

> "To me this is no different than what the bailiff has done at 3:00 o'clock for the seven weeks we've been in trial, that is walks the jury outside at 3:00 o'clock and they have a walk around. There's no cigarette smokers among the 16, I understand they want to go out. This is no different. And they will be in the custody of the bailiff and one deputy will be there, not to say anything, just if the bailiff needs assistance that's all. So that will be the entire party on the conveyance."

From the judge's comments, it was clear to the defendants and their counsel that the answer to the question about accompanying the jury on the view—at least in the same conveyance—was still "no." The record before us does not disclose whether any counsel

or members of the public would be permitted to follow the law enforcement vehicles trailing the jury's conveyance.

Later, Judge Clark informed the jury about the plans for the view:

> "As you know, any decision you jurors make in this case must be based on the evidence admitted here in court, viewed in light of the law that I say applies to that evidence. And you're going to be taken for a view of certain locations that have been discussed and/or depicted by photograph here in court. The purpose of the view is to assist you in understanding the evidence presented in court.
>
> "Now, during the view do not discuss the case. Don't allow anybody to discuss the case with you. Be alert to your surroundings during the trip, and take your notebooks with you. They allow no food or drink on the conveyance you're going to be on, I'm told. And on that conveyance you all are going to be together with Ms. Marquez, the bailiff. There will be one deputy sheriff. He's there to help the bailiff if the bailiff needs help. And as I say, no talk by anybody. The person in the lead car that will be leading the conveyance will know where you're going, and your driver of your conveyance will know to follow that car. There will also be marked vehicles following you to help with the traffic. Ms. Marquez will take you now downstairs on the conveyance, and we'll see you as soon as you get back. Thank you very much for your attention. Follow the bailiff."

Judge Clark expected the jury view to take approximately 2 hours.

Before the jury retired to deliberate, it was instructed that "[t]he purpose of the jury view was to assist you in understanding the evidence that has been admitted here in court."

Standards of Review

A district judge's decision to allow a jury view under K.S.A. 22-3418 generally is reviewed for abuse of discretion. *State v. Engelhardt*, 280 Kan. 113, 120, 119 P.3d 1148 (2005). But statutory interpretation and constitutional analysis raise legal questions subject to unlimited review on appeal. See *State v. Prine*, 297 Kan. 460, 474, 303 P.3d 662 (2013); *State v. Anderson*, 294 Kan. 450, 464, 276 P.3d 200 (2012).

Defendant's Right to be Present

R. Carr first argues that the jury view under K.S.A. 22-3418 violated his right to be present at all critical stages of his trial. The statute provides:

> "Whenever in the opinion of the court it is proper for the jurors to have a view of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. They may be accompanied by the defendant, his counsel and the prosecuting attorney. While the jurors are thus absent, no person other than the officer and the person appointed to show them the place shall speak to them on any subject connected

> with the trial. The officer or person appointed to show them the place shall speak to the jurors only to the extent necessary to conduct them to and identify the place or thing in question."

We have said that, under K.S.A. 22-3405(1) and the confrontation and due process provisions of the federal Constitution, a defendant in a felony case has both a statutory and constitutional right to be present at all "critical stages" of a prosecution. *State v. Herbel*, 296 Kan. at 1109 (quoting *State v. Bell*, 266 Kan. 896, 919-20, 975 P.2d 239, *cert. denied* 528 U.S. 905 [1999]). In determining whether a particular phase of a criminal proceeding is a critical stage, this court has examined "whether the defendant's presence is essential to a fair and just determination of a substantial issue." *State v. Edwards*, 264 Kan. 177, 197, 955 P.2d 1276 (1998). But the United States Supreme Court has ruled that due process does not require a defendant's presence at a jury view. See *Snyder v. Massachusetts*, 291 U.S. 97, 117-18, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

In 2005's *Engelhardt*, defendant Robert Engelhardt was charged with first-degree murder in the stabbing death in a trailer home. At trial, the State moved for a jury view to permit jurors to walk through the trailer where the murder took place. The State contended that the view would assist the jury in understanding the amount of space in the trailer and its layout. Engelhardt's counsel argued that Engelhardt had a right to be inside the trailer during the jury view because it was a "'critical stage'" of the proceeding and the jury would be seeing evidence. 280 Kan. at 120-21.

Citing the trailer's close quarters, the district judge ruled that Engelhardt would not be allowed inside the trailer with the jurors. Engelhardt rejected the judge's suggested compromise that would have had Engelhardt wait in a car across the street from the trailer during the view. Engelhardt also rejected the prosecutor's suggestion that Engelhardt be permitted to stand outside the trailer with the judge and counsel for both sides during the view. 280 Kan. at 121.

> "Ultimately only the jurors were taken to the scene by the bailiff. They had previously been directed by the district judge to enter the trailer two at a time, walk to one end and back, and then get back on the county bus that had transported them. The judge had further admonished the jurors not to talk among themselves or touch anything in the trailer." 280 Kan. at 121.

On review, this court ruled that the jury view did not constitute a critical stage of the proceeding against Engelhardt. 280 Kan. 113, Syl. ¶ 3. We said that "the role of the jury view was strictly corroborative," notwithstanding our recognition that it "enabled the jury to more fully appreciate the space available in the trailer and the distance between the place of the attack and the witnesses who had been in the bedrooms while the attack was taking place." 280 Kan. at 123. The view also permitted members of the jury to see the results of post-crime cleaning described by witnesses. 280 Kan. at 123.

In reaching our conclusion in *Engelhardt*, we also noted that "Kansas cases have consistently upheld jury views outside the presence of defendants." 280 Kan. at

123 (citing *State v. Hickles*, 261 Kan. 74, 88-89, 929 P.2d 141 [1996]; *State v. Laubach*, 220 Kan. 679, 681, 556 P.2d 405 [1976]; *State v. McCorgary*, 218 Kan. 358, 363-64, 543 P.2d 952 [1975], *cert. denied* 429 U.S. 867 [1976]; *State v. Zakoura*, 145 Kan. 804, 812-13, 68 P.2d 11 [1937]; *State v. Harris*, 103 Kan. 347, 352-53, 175 Pac. 153 [1918]; *State v. Adams*, 20 Kan. 311, 323-26 [1878]).

R. Carr recognizes this court's decision in *Engelhardt* but urges us to reconsider its holding. He asserts that the modern majority position of courts from other jurisdictions is that "a jury view constitutes evidence, and is therefore a stage of the trial at which the defendant has the right to be present personally and through counsel."

We are mindful of a split of authority from other jurisdictions on whether a jury view constitutes evidence and what appears to be the related issue of whether a criminal defendant has a right to be present. Compare *Stephenson v. State*, 742 N.E.2d 463, 493-94 (Ind. 2001) (defendant has no right to attend jury view under Sixth Amendment; jury view not evidence), with *State v. Pauline*, 100 Hawaii 356, 378, 60 P.3d 306 (2002) (jury view constitutes independent evidence; defendant has right to be present at view). We have long been mindful of the split among jurisdictions on whether a jury view of a crime scene constitutes evidence. See *State v. Adams*, 20 Kan. 311, 323-26 (1878) (holding defendant need not be present; noting contrary authority); see also 30 A.L.R. 1357 ("Presence of accused during view by jury," originally published in 1924).

Contrary to R. Carr's contention about the modern majority position, it appears that the majority of other jurisdictions still favor the rule that "a view is not itself evidence; like a demonstrative aid, its purpose is only to assist the trier of fact in understanding and evaluating the evidence." 2 McCormick on Evidence § 219 (7th ed. 2013). But the persistent majority certainly is not without its detractors. See *United States v. Gray*, 199 F.3d 547, 548-49 (1st Cir. 1999) ("[M]ost of the usual commentators on matters of evidence either question the rationale for excluding views from evidentiary status, observe that the position has lost favor, or both."); 2 McCormick § 219 (7th ed. 2013) (citing six cases, including *Pauline* and *Gray*).

The Georgia Supreme Court has taken a modified approach under which it recognizes at least two types of jury views: an "'evidentiary view'" and a "'scene view.'" See *Jordan v. State*, 247 Ga. 328, 345, 276 S.E.2d 224 (1981). An evidentiary view "permit[s] the jury to view evidence introduced in the case which evidence is so large or affixed that it cannot be brought into the courtroom." 247 Ga. at 345 (*e.g.*, jury view of vehicle admitted as evidence). A scene view, on the other hand, "permit[s] the jury to view the premises relevant to the case to enable the jury to better understand the testimony and other evidence introduced in court A view of the scene is not 'evidence' in the case." 247 Ga. at 345-46. The Georgia court held that a defendant's right of confrontation was not violated if he or she was absent at a scene view, but it also observed in a footnote that the two types of views are not necessarily mutually exclusive. 247 Ga. at 345 n.23 (*e.g.*, "bullet holes in the walls and ceilings viewed").

We admit to some discomfort about our historical nonevidentiary treatment of jury views outside of a defendant's presence. But we also are cognizant that competing practicalities may sometimes have to control. In this case, for instance, it may have been, practically speaking, impossible for the defendants to ride on the conveyance with members of the jury without a heavier and potentially prejudicial security presence. On the other hand, it does not appear that it would have been impossible to permit counsel to ride with the jury in their clients' stead or that it would have been impossible to permit the defendants and their counsel to be transported in a law enforcement vehicle traveling behind the jury's conveyance.

We will for the time being continue to adhere to our precedent, the evident leaning of the United States Supreme Court when it said due process concerns were not implicated by the defendant's absence from a jury view in the *Snyder* case, 291 U.S. at 117-18, and the continuing majority rule among other jurisdictions that a jury view is nonevidentiary and not a critical stage of the proceedings requiring the defendant's presence. Neither the Kansas statute nor R. Carr's right to be present was violated when Judge Clark excluded him from the jury view in this case.

We nevertheless urge district judges in future cases to consider all reasonable alternatives to accommodate a criminal defendant's presence at jury views, insofar as it is practically possible to effect it. As the Supreme Court of Hawaii put it in *Pauline*, we may not always continue to "assume that jurors, however they may be instructed, will apply the metaphysical distinction suggested and ignore the evidence of their own senses

when it conflicts with the testimony of the witnesses.'" 100 Hawaii at 373 (quoting 2 McCormick on Evidence, § 216 [5th ed. 1999]).

Defendant's Right to Assistance of Counsel

The Sixth Amendment also guarantees a defendant a constitutional right to counsel at all "critical stages" of a proceeding. *State v. Lawson*, 296 Kan. 1084, 1096, 297 P.3d 1164 (2013) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 [2009]). Its Kansas codification in K.S.A. 22-4503 has potentially broader coverage; it provides that a defendant is entitled to have assistance of counsel at every "stage" of the proceedings against him or her. See *Lawson*, 296 Kan. at 1096 (critical stage "likewise a stage of the criminal proceeding" under K.S.A. 22-4503).

Having concluded that the nonevidentiary jury view in this case was not a critical stage of the proceeding, we also conclude that R. Carr's Sixth Amendment right to counsel was not violated by it. Our ruling on the dispensability of defendant's presence leads us to the same ruling on the dispensability of defense counsel's. That being said, we still urge district judges faced with jury view requests in future cases to accommodate the presence of defense counsel where possible.

On the question of whether the legislature intended to provide greater protection for a defendant's right to assistance of counsel than that provided by the Sixth Amendment, *i.e.*, that its choice of the phrase "stage of the proceeding" over the phrase "critical stage of the proceeding" has legal significance, we are doubtful. If greater protection were the goal, the legislature would

not have made defense counsel's presence at a jury view discretionary under K.S.A. 22-3418. The better practice for Judge Clark would have been to allow defense counsel to attend the jury view, but the view did not qualify as a stage of the proceeding requiring counsel's presence under K.S.A. 22-4503.

Defendant's Right to Public Trial

We decline to reach R. Carr's public trial argument because the record before us does not support it. After careful review, we see nothing in it to indicate that any member of the public's ability to follow the jury's conveyance from place to place during the view was disallowed or impeded in any way.

24. Modification of Eyewitness Identification Instruction

R. Carr argues that the district court erred when it denied his requested addition to the PIK cautionary instruction on the reliability of eyewitness identifications.

As given, the instruction read:

> "The law places the burden upon the State to identify a defendant. The law does not require a defendant to prove he has been wrongly identified. In weighing the reliability of eyewitness identification testimony, you first should determine whether any of the following factors existed and, if so, the extent to which they would affect accuracy of identification by an eyewitness. Factors you may consider are:

"1. The opportunity the witness had to observe. This includes any physical condition which could affect the ability of the witness to observe, the length of the time of observation, and any limitation on observation like an obstruction or poor lighting;

"2. The emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence;

"3. Whether the witness had observed the defendant on earlier occasions;

"4. Whether a significant amount of time elapsed between the crime charged and any later identification;

"5. Whether the witness ever failed to identify the defendant or made any inconsistent identification;

"6. The degree of certainty demonstrated by the witness at the time of any identification of the accused; and

"7. Whether there are any other circumstances that may have affected the accuracy of the eyewitness identification."

R. Carr proposed adding an eighth factor, informing jurors that they could consider "[t]he race of the witness and the race of the person observed." Judge Clark rejected this proposal.

As discussed with regard to other instructions issues, our first question concerns reviewability. See *State v. Williams*, 295 Kan. 506, 515-16, 286 P.3d 195 (2012); *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012). R. Carr's request for the addition to the instruction in the district court preserved this issue for appellate review without imposition of the "clearly erroneous" burden under K.S.A. 22-3414(3). See *Williams*, 295 Kan. at 515-16.

We next address whether the requested additional language was legally appropriate, applying a de novo standard of review. See *Plummer*, 295 Kan. 156, Syl. ¶ 1. This is where R. Carr's argument fails. The seventh factor set out in the instruction was a catch-all, covering "any other circumstances that may have affected the accuracy of the eyewitness identification." In our view, it was not necessary to list additional factors or to fail to highlight additional factors for the jury's consideration. Under the catch-all's broad language, counsel for the defense were free to argue any factor the evidence would support.

Under K.S.A. 2013 Supp. 21-6619(b), which permits us to notice unassigned error in a capital case, we recognize that the PIK cautionary instruction on eyewitness identification reliability contained a factor we recently identified as erroneous. See *State v. Mitchell*, 294 Kan. 469, Syl. ¶ 4, 275 P.3d 905 (2012) ("Jurors should not be instructed that the degree of certainty expressed by the witness at the time of an identification of the defendant is a factor they should weigh when evaluating the reliability of that eyewitness identification testimony."). No case to date has found the inclusion of this factor reversible error,

and we continue that streak here. See *State v. Dobbs*, 297 Kan. 1225, 1241, 308 P.3d 1258 (2013). Under the circumstances of this case, there is no reasonable possibility the jury would have rendered a different verdict absent the inclusion of the erroneous certainty factor. Reversal is not required.

25. AIDING AND ABETTING INSTRUCTION

Between the two of them, the defendants challenge the aiding and abetting instruction given by Judge Clark on three grounds. They argue that it was clearly erroneous because it permitted jurors to convict them as aiders and abettors for reasonably foreseeable crimes of the other, because it failed to communicate that an aider and abettor had to possess premeditated intent to kill personally in order to be convicted of capital murder, and because it omitted language from K.S.A. 21-3205(2).

To the extent that one defendant or another does not advance an argument among these three, we notice any unassigned error under K.S.A. 2013 Supp. 21-6619(b). We cannot know which defendant was convicted as a principal and which as an aider and abettor on many of the joint charges, including those for capital murder. Thus all three arguments are equally applicable to each defendant.

Additional Factual and Procedural Background

After the close of the evidence, the jury was instructed on the elements of capital murder. Jurors were told that, in order for them to find a defendant guilty, the State must prove beyond a reasonable doubt that the defendant intentionally killed the victim and that "such killing was done with premeditation." The

instruction also specified that "each defendant" was charged with the offense, and that "[e]ach defendant pleads not guilty to the charge."

With respect to the attempted first-degree premeditated murder charge, the jury was instructed on the elements of attempt, including specific direction that a finding of guilt could not be reached unless the defendant performed an overt act toward the commission of the crime of first-degree murder with the intent to commit that crime. The jury also was instructed on the elements of first-degree premeditated murder. Like the capital murder instruction, the instruction further specified that "each defendant" was charged with the offense, and that "[e]ach defendant pleads not guilty to the charge."

Judge Clark also gave the jury Instruction No. 8 on accomplice liability, to which neither defendant objected. Part of this instruction has been quoted before in Section 13 of this opinion. We include a quote of the entire instruction here for ease of reference:

> "A person who, either before or during its commission, intentionally aids, abets, advises, or counsels another to commit a crime with intent to promote or assist in its commission is criminally responsible for the crime committed regardless of the extent of the person's participation, if any, in the actual commission of the crime.
>
> "A person who, either before or during its commission, intentionally aids, abets, advises, or counsels another to commit a crime is also responsible for any other crime committed in

> carrying out or attempting to carry out the intended crime, if the other crime was reasonably foreseeable.
>
> "A person who, either before or during its commission, intentionally counsels, procures or uses force or the threat of force to compel another to commit a crime is responsible for the crime although the other who directly committed the act constituting the crime lacked criminal or legal capacity."

Given the multiple charges against the defendants, Judge Clark also instructed that "[e]ach crime charged against an individual defendant is a separate and distinct offense," and that the jury "must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge." Judge Clark further instructed that the State bore the burden to prove "each individual defendant is guilty" and that the defendants must be presumed innocent.

The State had relied on an aiding and abetting theory to argue that J. Carr was guilty of capital murder of Heather M., Aaron S., Brad H., and Jason B. and guilty of attempted first-degree premeditated murder of Holly G., but one of the prosecutors also told the jury during closing argument that it did not matter "who the shooter was" in those crimes. In reference to the criminal possession of firearm charges against R. Carr, one of the prosecutors told the jury in closing that R. Carr should be found guilty on the basis of his possession of "[t]his firearm," referring to the black Lorcin, on December 7, December 11, and December 14 and 15.

Reasonable Foreseeability of Crimes of Another

The defendants argue that the "reasonably foreseeable crimes" paragraph of Instruction No. 8 requires reversal of their capital murder and attempted first-degree premeditated murder convictions, because it allowed the jury to find either of them guilty, not because he acted with premeditation, but because he aided and abetted his codefendant in the commission of one of the preceding Birchwood offenses and the victims' shootings were a reasonably foreseeable outcome of those other offenses.

For example, if the jury believed that one of the defendants aided and abetted his codefendant in the commission of aggravated kidnapping of one of the Birchwood victims and that the four murders were reasonably foreseeable outcomes of the aggravated kidnapping, then the jury could have convicted the defendant of capital murder, even if there was insufficient evidence that he acted with premeditation. In essence, in the defendants' view, the challenged language in the instruction allowed the jury to substitute a "reasonably foreseeable" standard for the essential element of premeditation for an aider and abettor of capital murder.

Again, we apply a "clearly erroneous" standard when a party fails to object to an instruction at trial. See *State v. Williams*, 295 Kan. at 510. We do so in death penalty cases as well as in other criminal cases. See *State v. Kleypas*, 272 Kan. 894, 939, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002), *abrogated on other grounds Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). Under the clear

error framework, the first question we must address is whether error occurred at all.

The first paragraph of Instruction No. 8 was based on PIK Crim. 3d 54.05 (Responsibility for Crimes of Another), and the second paragraph was based on PIK Crim. 3d 54.06 (Responsibility for Crimes of Another—Crime Not Intended). PIK Crim. 3d 54.05 conforms to K.S.A. 21-3205(1). PIK Crim. 3d 54.06 conforms to K.S.A. 21-3205(2).

We have previously approved of both PIK Crim. 3d 54.05 and 54.06 when they have been used independently. See *State v. Manard*, 267 Kan. 20, 34, 978 P.2d 253 (1999) (PIK Crim. 3d 54.05); *State v. Gleason*, 277 Kan. 624, 636-38, 88 P.3d 218 (2004) (PIK Crim. 3d 54.06).

But we have held that a district judge commits error by giving both instructions together in a case when a defendant is charged with a specific-intent crime. *State v. Overstreet*, 288 Kan. 1, 13, 200 P.3d 427 (2009) (prosecution for attempted first-degree premeditated murder). We have agreed with the defense position here—in such a situation, the reasonably foreseeable language allows the jury to substitute a "reasonably foreseeable" standard for the specific intent element of the charged offense. See *State v. Engelhardt*, 280 Kan. 113, 119 P.3d 1148 (2005). And, since our 2005 decision in *Engelhardt*, we have consistently applied this rule. See *State v. Cofield*, 288 Kan. 367, 373, 203 P.3d 1261 (2009) ("reasonably foreseeable crimes" aiding and abetting instruction erroneous in that it allowed the jury to apply a foreseeability standard to support conviction requiring specific intent of premeditation); *Overstreet*, 288 Kan. at 13 (PIK Crim. 3d 54.06

"reasonably foreseeable crimes" instruction improper when defendant charged with attempted first-degree premeditated murder).

Judge Clark committed error when he included both the first and second paragraphs of Instruction No. 8, without further explaining that the "reasonably foreseeable" language did not eliminate the State's burden to prove an aider and abettor's specific intent on any crime requiring such an element, including capital murder and attempted first-degree premeditated murder.

Having held there was error, we turn to whether that error was reversible under K.S.A. 22-3414(3). To do so, we review the entire record to determine whether we are firmly convinced the jury would have reached a different verdict but for the error. The burden of demonstrating clear error rests with the defendants. *Williams*, 295 Kan. at 516.

When faced with the question of whether error of the type here merited reversal in prior cases, we have twice determined reversal was not necessary, see *Cofield*, 288 Kan. at 373-74 (large number of shots fired; defendant, cohorts took loaded guns on car ride; victims vulnerable; defendant confessed he fired at victims); *Engelhardt*, 280 Kan. at 133-34 (evidence established victim stabbed approximately 55 times; defendant clearly involved, not an innocent bystander), and once that it was, see *Overstreet*, 288 Kan. at 14-15 (evidence suggested defendant driver, not shooter; prosecutor's statements compounded instruction error). On one of the cases in which we ruled that reversal was not necessary, clear error was the governing standard. See *Cofield*, 288 Kan. at 372-73. On the case in which

reversal was necessary, clear error also was the governing standard. See *Overstreet*, 288 Kan. at 9-10. Together, these cases lead us to conclude that the difference between ordinary error and clear error on this issue depends on the strength of the State's case for the existence of premeditation and thus the likelihood that the "reasonably foreseeable" language may have played a role in the jury's finding or findings of guilt.

Premeditation means

> "to have thought over the matter beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life." PIK Crim. 3d 56.04(b) (approved in *State v. Saleem*, 267 Kan. 100, 105, 977 P.2d 921 [1999]).

While the State can certainly establish a defendant's premeditation with direct evidence, more frequently, it must rely on circumstantial evidence. *State v. Scaife*, 286 Kan. 614, 620, 186 P.3d 755 (2008).

> "'Circumstances which may give rise to the inference of premeditation include: (1) the nature of the weapon used; (2) lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless.'" *State v. Sanchez-Cazares*, 276 Kan.

451, 459, 78 P.3d 55 (2003) (quoting *State v. Murillo*, 269 Kan. 281, 286, 7 P.3d 264 [2000]).

Both R. Carr and J. Carr begin their arguments in support of the existence of clear error with a simple observation: There were two defendants implicated in the capital murders and the attempted first-degree premeditated murder, but the identity of the shooter is unknown. This sets the stage for each to assert that the other was the actual triggerman and to plead ignorance of the triggerman's plan to shoot the victims.

Specifically, R. Carr suggests that the record lacks evidence of premeditation on his part. He points to the statements the Birchwood intruder identified as him made to Holly G. He also points to the pattern of the first kidnapper's behavior in the Schreiber incident—Schreiber was kidnapped, driven to ATMs, then driven to a remote location and left alive with his damaged car. R. Carr asserts that this pattern demonstrates that he would have had every reason to expect the same outcome when the Birchwood victims were driven to the soccer field. Finally, R. Carr also argues that the Birchwood intruder identified as J. Carr played the lead in the final stages of that incident—he drove the first car on the way to the scene of the shootings.

J. Carr makes a mirror-image argument, contending the record lacks evidence of his premeditation. He notes that, before the Birchwood incident, he had acquired a train ticket for travel out of the Wichita area very early on December 15, 2000. He had prepared for the trip the previous day by buying a box for his belongings with Adams. J. Carr observes that Holly G. discussed the possibility of the victims

being shot only with the other Birchwood intruder; during those conversations, the intruder identified as J. Carr was out of earshot. Despite his acquittal on the crimes charged as a result of the Schreiber incident, he also argues that the second kidnapper would have relied on the first kidnapper's pattern of behavior with Schreiber, including the fact that he was left alive in a remote area.

Both defendants have chosen well among the facts in evidence, but we do not have that luxury. In order to determine whether clear instruction error demands reversal, we must examine the entire record and make a de novo determination. See *State v. Phillips*, 295 Kan. 929, 936-37, 287 P.3d 245 (2012).

Viewed in its entirety, we have no trouble concluding that the record contains a wealth of evidence of both the eventual principal's and the eventual aider and abettor's premeditation. Four of the five circumstances we have identified as influential on the question of premeditation plainly existed in this case.

Both Birchwood intruders were armed with handguns, and the victims were shot with one of them, the black Lorcin. Holly G. saw a black gun in the possession of the intruder identified as R. Carr. Adams had seen the black gun in J. Carr's possession within a few days of the Birchwood incident. See *Sanchez-Cazares*, 276 Kan. at 459 (use of an SKS semi-automatic assault rifle circumstantial evidence of premeditation).

The record also convincingly establishes lack of provocation on the part of the Birchwood victims. None

knew R. or J. Carr. There was some evidence the entire encounter was accidental, because a light-colored car had followed the victims' neighbor from the unit next door home just before the incident began. See *State v. White*, 263 Kan. 283, 295, 950 P.2d 1316 (1997) (lack of provocation, use of deadly weapon sufficient to infer premeditation).

Several facts concerning the Birchwood intruders' conduct both before and after the killings also tend to show premeditation.

First, the black Lorcin was used in the gun-facilitated kidnapping and robbery of Schreiber and in the shooting of Walenta in the days leading up to the Birchwood crimes. See *State v. Drennan*, 278 Kan. 704, 718, 101 P.3d 1218 (2004) (prior similar murder probative of premeditation in charged murder); *State v. Henson*, 221 Kan. 635, 645, 562 P.2d 51 (1977) (evidence of a previous similar incident relevant to show premeditation).

Second, during the crimes at the Birchwood home and again in the soccer field, the two intruders had conversations between themselves, giving rise to an inference of mutual consultation and planning.

Third, as events began to unfold at Birchwood, the intruders made some effort to conceal their identities. For instance, they covered Holly G.'s face with an article of clothing; and, when the intruder identified as R. Carr drove her to the ATM, he specifically instructed her not to look in his direction. By the time the group was en route in two vehicles to the soccer field, the intruder identified as R. Carr had stopped trying to conceal his identity. See *State v. Hernandez*, 232 Ariz.

313, 324, 305 P.3d 378 (2013) (jury could have found defendant acted as accomplice, intending to aid codefendant in committing capital murder, based on planned home invasion, no attempt to conceal his identity from victims); *State v. Ellison*, 213 Ariz. 116, 134, 140 P.3d 899 (2006) (evidence defendant planned home invasion, did not attempt to conceal identity, among other evidence, sufficient to establish aiding and abetting premeditated capital murder, imposition of death sentence).

At the soccer field, both intruders had the victims kneel down. See *People v. Youngblood,* 165 Mich. App. 381, 387, 418 N.W.2d 472 (1988) (premeditation can be based on circumstantial evidence of organized conduct suggesting existence of plan); *State v. Stewart*, 714 S.W.2d 724, 726 (Mo. App. 1986) (evidence supported finding of premeditation when defendant part of coordinated attack on victim). The two intruders were standing in close proximity to one another. As the shots began, and the victims started screaming, neither intruder attempted to intercede. See *State v. Edgar*, 281 Kan. 47, 68, 127 P.3d 1016 (2006) (defendant's failure to oppose commission of crime supports inference defendant assented to, approved of, encouraged its commission; thus aided, abetted); *State v. Ly,* 277 Kan. 386, 395, 85 P.3d 1200 (2004) (failure to intercede in events culminating in homicide supports guilt on aiding, abetting). The five victims were shot execution-style. See *People v. Robinson*, 37 Cal. 4th 592, 630, 124 P.3d 363 (2005) (execution-style shooting of kneeling victim supported theory that murder premeditated); *People v. Bloyd*, 43 Cal. 3d 333, 348, 233 Cal. Rptr. 368, 729 P.2d 802 (1987) (execution-style killings at close-range "very strong evidence" of

premeditation); see also *Nguyen v. Knowles*, CIV S-03-2381 MCE, 2011 WL 1076751, at *19 (E.D. Cal. 2011) (unpublished opinion), *subsequently aff'd* 475 F Appx. 128 (9th Cir. 2012), *cert. denied* 133 S. Ct. 277 (2012) ("the speed and effectiveness with which the victim was killed indicated premeditation and deliberation by all four defendants").

After the two intruders left the soccer field, the evidence suggests that they returned to the Birchwood home to steal the victims' belongings, including the big screen television mentioned in one of their conversations. The same morning, law enforcement found both defendants in possession of the victims' property. The jury could have inferred that the capital murders and the attempted first-degree premeditated murder were carried out, at least in part, to facilitate the subsequent stealing, again, demonstrating premeditation. See *Drayden v. White*, 232 F.3d 704, 709-10 (9th Cir. 2000) (defendant's conduct after murder—including cleaning of scene, search of victim's apartment, stealing of car, other property—evidence of premeditated plan to rob victim, calculated strategy to kill him in furtherance of plan); *People v. Kelly*, 231 Mich. App. 627, 642, 588 N.W.2d 480 (1998) (premeditation supported by evidence defendant took victim's automobile, items from her home after killing, attempted to sell them); *State v. Hardimon*, 310 N.W.2d 564, 566 (Minn. 1981) (jury's finding of premeditation supported by evidence defendant remained in house looking for items to steal after victims killed).

The two Birchwood intruders also made repeated threats throughout the crimes. When Aaron S. resisted

their demands, they struck him in the head, hard enough that he cried out in pain. When Holly G. asked the intruder identified as R. Carr if he and the other intruder planned to shoot the victims, he initially responded "no." Later, however, after poking Holly G. in the back with what she believed to be a gun, he said, "[D]on't worry, I'm not going to shoot you *yet*." (Emphasis added.) See *State v. Broadus*, 206 Kan. 766, 769, 481 P.2d 1006 (1971) (prior threats, along with other circumstantial evidence, supports finding of premeditation).

In the end, the fact that the State could not firmly establish which Birchwood intruder was the principal and which the aider and abettor of the capital murders and attempted first-degree premeditated murder, even in light of the erroneous "reasonably foreseeable" language in Instruction No. 8, is overcome by the strength of the circumstantial evidence throughout the whole record on the intruders' shared premeditation. See *State v. Hall*, 292 Kan. 841, 859, 257 P.3d 272 (2011) (quoting *State v. Doyle*, 272 Kan. 1157, 1162, 38 P.3d 650 [2002]) (circumstantial evidence "sufficient to establish even the gravest offenses"). The two intruders worked as a team throughout the night, and this included their concerted joint action at the soccer field. See *State v. Bradford*, 272 Kan. 523, 528, 34 P.3d 434 (2001) (defendant's argument that he was not triggerman failed to provide defense to accomplice liability for capital murder, in light of evidence of his collaboration); *State v. Wakefield*, 267 Kan. 116, 123, 977 P.2d 941 (1999) (evidence sufficient to convict defendant as aider, abettor, when he knew cohort ascending stairs of home to kill victims, continued removing items from home rather than intercede).

Furthermore, in this case, the State did not pin a legally flawed theory of guilt on the capital murders and the attempted first-degree premeditated murder to the erroneous instruction. See *Overstreet*, 288 Kan. at 14-15 (prosecutor's argument reinforced erroneous instruction). Rather, one of the prosecutors told the jury that the State had charged both defendants with all of the crimes against the Birchwood victims "because of their equal participation in those intended crimes." The only time that the "reasonably foreseeable" language was mentioned was in reference to one of the rapes of Holly G. On the capital murders and the attempted first-degree premeditated murder, the State properly focused its arguments on the strength of its evidence of both intruders' premeditation.

Judge Clark's other instructions also emphasized the requirement of premeditation as a condition precedent to conviction of either defendant on the capital murders and the attempted first-degree premeditated murder. The judge also told the jury that it could convict defendants of second-degree murder as a lesser included offense of capital murder if there was no premeditation. See *State v. Ellmaker*, 289 Kan. 1132, 1139-40, 221 P.3d 1105 (2009) (reviewing court must "examine the instructions as a whole, rather than isolate any one instruction, and determine if the instructions properly and fairly state the law as applied to the facts of the case").

The inclusion of the "reasonably foreseeable" language in Instruction No. 8 was not clearly erroneous.

Personal Premeditated Intent to Kill

The defense also takes issue with the wording of the first paragraph of Instruction No. 8, asserting it was clearly erroneous because it failed to explain that an aider and abettor, not only a principal, must have personally possessed premeditation on the capital murders and attempted first-degree premeditated murder before conviction would be appropriate.

We have rejected this defense argument in two cases decided this year. See *State v. Gleason*, No. 97,296, 299 Kan. ___, Syl. ¶ 1, ___ P.3d ___ (filed July 18, 2014) (slip op. at 29-30); *State v. Betancourt*, 299 Kan. 131, 138-41, 322 P.3d 353 (2014). We will not revisit those holdings or their supporting rationales at this time.

Omission of K.S.A. 21-3205(2) Language

The final defense complaint about the aiding and abetting instruction is that its second paragraph should have included an additional phrase from K.S.A. 21-3205(2) to avoid being labeled clearly erroneous.

As mentioned, this paragraph of the instruction was based on PIK Crim.3d 54.06, which, in turn, is based on K.S.A. 21-3205(2). That statute reads: "A person liable under subsection (1) hereof is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable *by such person as a probable consequence of committing or attempting to commit the crime intended*." (Emphasis added.) The emphasized language was left out of Instruction No. 8.

J. Carr, in particular, argues that the omission meant the jury never heard about a critical causation

element of aider and abettor liability. In the words of his brief, "the unintended crime has to be more than reasonably foreseeable; it has to be foreseeable as *a consequence* of the actions taken to commit the intended crime." (Emphasis added.) He relies on our decision in *Overstreet,* 288 Kan. at 14-15, in which we noted that the jury may have improperly convicted the defendant, not because he had the requisite intent, "but because the murder was a reasonably foreseeable *consequence of*" an aggravated assault. (Emphasis added.)

J. Carr also argues that omission of the word "probable" before the word "consequence" means Instruction No. 8 failed to convey to the jury how likely the unintended crime must be in order for an aider and abettor to be held criminally liable. His last critical observation is that what may be a "probable consequence" for two defendants with a long history, such as the defendants here, may be something different for two defendants who lack that history.

We note that the newer version of the PIK instruction includes the language the defense campaigns for here, see PIK Crim. 4th 52.140, leading us to recommend its use as the better practice in the future. Still, because we have approved the PIK Crim. 3d version of the instruction without the language as recently as our 2004 decision in *State v. Gleason*, 277 Kan. 624, 636-38, 88 P.3d 218 (2004) we adhere to our precedent and hold that Judge Clark did not commit clear error in omitting the phrase from Instruction No. 8 at the defendants' 2002 trial.

26. Prosecutorial Misconduct

R. Carr has not argued prosecutorial misconduct in his appeal. But J. Carr argues in his separate appeal that one of the prosecutors committed misconduct by encouraging jurors during closing argument to place themselves in the position of the victims in the three incidents. Under K.S.A. 2013 Supp. 21-6619(b), we take up this argument as unassigned in R. Carr's case.

Additional Factual and Procedural Background

The prosecutor began her closing argument in this way:

> "Ladies and gentlemen of the jury, you have been here a long time and you've heard a lot of evidence. You've seen a lot of exhibits, over 850. You've heard from over 95 witnesses. There are multiple counts against the defendant Jonathan Carr, 47; 50 against the defendant Reginald Carr. And we've been here in this well-lighted courtroom. You've seen a lot of pictures. But you view it at a distance. We view it in a place where it's about 75 degrees, not 25. We view it in a place where there's no wind chill. We view it in a place where we stand on ground or sit in cushioned chairs, no snow beneath our feet or below our knees. We view it at a distance in such a way that we cannot hear the sounds that were part of these crimes. We cannot hear the threats and the demands made to Andrew Schreiber; Move over, Give us your wallet, Give us your watch, Get down. We cannot hear, We're not done yet. We cannot hear the sounds of someone approaching and the glass breaking at Ann

Walenta's window. We cannot hear the sound of the engine when she's trying to start it again. We can't hear in this courtroom that blasting horn, that plea for help. We can't hear in this courtroom those demands that were made at Birchwood to those five young people. We can't hear, We're going to pop your ass. We can't hear, Keep that dog quiet. We can't hear the screams of [Jason B.] when he realizes someone is bursting into the bedroom in which he sleeps, or the screams of [Brad H.] when he's assaulted first with gunpoint in the basement. We can't hear those screams that were made and cries that were made in that closet while [Holly G.] was crying while the man she loved, [Jason B.], was at the mercy of a gunman taking all of his money out at the ATM's. And we can't hear the cries of [Aaron S.] in that same closet when he was hearing the moans of the woman he cared about being [brutally] raped. And, you know, we can't hear in this courtroom—as much evidence as we fill it with, we cannot hear [Aaron S.] on his knees screaming, Please, sir, Please, God when he realizes a bullet has been fired into [Heather M.'s] head.

"So we're distanced. But the reality of these crimes [is] in front of you for your decision, your decision based on evidence—overwhelming evidence that proves the guilt of these two men."

Standard of Review

For many years, we have said that

> "review of prosecutorial misconduct claims involves a two-step process. The court first decides whether the comments were outside the wide latitude a prosecutor is allowed, *e.g.*, in discussing the evidence. If so, there was misconduct. Second, if misconduct is found, we have said the court must determine whether the improper comments prejudiced the jury and denied the defendant a fair trial. *State v. Marshall*, 294 Kan. 850, 856, 281 P.3d 1112 (2012)." *State v. Bridges*, 297 Kan. 989, 1012, 306 P.3d 244 (2013).

Comment Within Wide Latitude Permitted Prosecutors

The defense argument is that this passage from the prosecutor's closing did nothing to help the jury analyze the evidence, that it focused on the nature of the crimes instead of who committed them, and that it invited the jury to consider the crimes through the eyes of the victim. By focusing on these subjects, rather than the elements of the charged crimes, the suggestion is that the comment was equivalent to an improper victim impact statement or akin to a forbidden "golden rule" argument. See *State v. Stano*, 284 Kan. 126, 150, 159 P.3d 931 (2007) (prosecutor's references to value of victim's life to surviving wife improper); *State v. Corbett*, 281 Kan. 294, 313, 130 P.3d 1179 (2006) ("golden rule" generally improper); *State v. Donesay*, 265 Kan. 60, 82, 959 P.2d 862 (1998) (victim impact evidence improper); *Walters v. Hitchcock*, 237 Kan. 31, 33, 697 P.2d 847 (1985) ("golden rule" argument may

improperly encourage jurors to place themselves in position of plaintiff).

The State contends that the quoted passage was appropriate commentary on the evidence. It cites cases approving prosecution explanations of evidence. See, *e.g.*, *State v. McHenry*, 276 Kan. 513, 78 P.3d 403 (2003), *disapproved on other grounds by State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006); *State v. Cravatt*, 267 Kan. 314, 335-36, 979 P.2d 679 (1999).

"The fundamental rule for closing arguments is that the prosecutor must confine his or her remarks to matters in evidence." *State v. Ly*, 277 Kan. 386, 393, 85 P.3d 1200, *cert. denied* 541 U.S. 1090 (2004). "In closing argument, a prosecutor may comment on admitted evidence as long as the remarks accurately reflect the evidence, accurately state the law, and are not intended to inflame the jury's passions or prejudices or divert the jury from its duty to decide the case based on the evidence and controlling law." *State v. Anderson*, 294 Kan. 450, 463, 276 P.3d 200 (2012), *cert. denied* 133 S. Ct. 529 (2012) (citing *State v. Raskie*, 293 Kan. 906, Syl. ¶ 3, 269 P.3d 1268 [2012]); *Corbett*, 281 Kan. at 313 (citing *State v. Tosh*, 278 Kan. 83, 90, 91 P.3d 1204 [2004]) ("Prosecutors should not make statements that inflame the passions or prejudices of the jury or distract the jury from its duty to make decisions based on the evidence and the controlling law.").

We have approved of comparably dramatic performances by prosecutors. In *State v. Hall*, 292 Kan. 841, 257 P.3d 272 (2011), for example, the prosecutor said:

> "[T]he blood on that sidewalk that was spilled that day is long since gone. The memories of that day though of the witnesses that you heard from are not. Thank goodness they were here to tell you what happened. And now it's your responsibility to go back, view that evidence, not forget what happened, but expose what happened, and tell this man exactly what he's guilty of: First-degree premeditated murder and criminal possession of a firearm." 292 Kan. at 853.

The defendant challenged these comments on appeal, but we held that they were proper reminders to the jury "of their responsibility to review the evidence" and that the prosecutor could ask the jury "to return a guilty verdict based on that evidence." 292 Kan. at 854.

Likewise, in *State v. Bennington*, 293 Kan. 503, 532-33, 264 P.3d 440 (2011), when the prosecutor told the jury, "'The victim's not here to show, to tell you her side of the story Use your common sense, please, and remember what the DNA is doing for us here. It's speaking for [the victim]. It's telling us who committed these crimes,'" we held that the remarks were not an attempt to create inappropriate sympathy. 293 Kan. at 532-33; see *Cravatt*, 267 Kan. at 335-36 ("When examining the legal intricacies of this case, when reading this cold white paper, don't ever forget the human life that was taken [The victim] was 21 years old. He'll never live again. The defendant shot him in cold blood. Don't let him get away with it'"; comments designed to encourage jury to "seriously consider the nature of the defendant's act towards the victim").

Under these cases, we detect no error in the prosecutor's remarks here. She properly acknowledged the jury's efforts. She then commented on the enormity of the evidence and the unusually large number of charges. And, finally, she suggested that, despite the difference between in-court descriptions and lived experience, the jury had heard and seen plenty of evidence to convict the defendants. She referenced only facts and events in evidence. She did not explicitly invite the jury to consider the crimes through the eyes of the victims. She did not allude to any lingering trauma or psychological damage to the victims or to their family and friends.

The wide latitude permitted a prosecutor in discussing the evidence during closing argument in a criminal case includes at least limited room for rhetoric and persuasion, even for eloquence and modest spectacle. It is not opening statement; it is not confined to a dry recitation of the evidence presented. Compare *State v. Hilt*, 299 Kan. 176, Syl. ¶ 9, 322 P.3d 367 (2014) ("A prosecutor may use analogies, similes, allusions, and other rhetorical devices in an attempt to bring order to the facts presented at trial, place them in a meaningful context, and construct the whole of a case. Within sensible limits set by similarity and dissimilarity to the facts of a case, a prosecutor's appropriate rhetorical devices may include film allusions and comparisons or be otherwise theatrical."), with *Kleypas*, 272 Kan. at 894, Syl. ¶ 23 ("Opening statements by counsel in criminal prosecutions are not evidence. They are given for the purposes of assisting the jury in understanding what each side expects its evidence at trial will establish and to advise the jury what questions will be presented for its decision.")

We reject the defense argument that the prosecutor exceeded the wide latitude permitted her in this case.

27. CUMULATIVE ERROR

R. Carr's final challenge on the guilt phase of his trial is based on the cumulative error doctrine.

> "Cumulative error, considered collectively, may be so great as to require reversal of a defendant's conviction. The test is whether the totality of the circumstances substantially prejudiced the defendant and denied him or her a fair trial. No prejudicial error may be found under the cumulative error doctrine if the evidence against the defendant is overwhelming. *State v. Cosby*, 285 Kan. 230, Syl. ¶ 9, 169 P.3d 1128 (2007). Moreover, this doctrine does not apply if no error or only one error supports reversal. See *State v. Carter*, 284 Kan. 312, 332, 160 P.3d 457 (2007)." *State v. Dixon*, 289 Kan. 46, 71, 209 P.3d 675 (2009).

In assessing whether the weight of cumulative errors can be harmless, we examine the errors in the context of the entire record, including remedial efforts of the trial court, the nature and number of the errors and whether they are interrelated, and the strength of the evidence against the defendant. *State v. Warrior*, 294 Kan. 484, 517, 277 P.3d 1111 (2012).

Thus the final question we must answer in the guilt phase is whether the cumulative impact of multiple harmless errors was harmless beyond a reasonable doubt. See *State v. Armstrong*, 299 Kan. 405, Syl. ¶ 10, 324 P.3d 1052 (2014). This "task is undoubtedly more subtle than simply counting up the number of errors

discovered." See *Grant v. Trammell*, 727 F.3d 1006, 1025 (10th Cir. 2013).

We have held that there were several errors, none of them, standing alone, requiring reversal of all of R. Carr's convictions. To recap, they are:

- The district judge erred in refusing to sever the guilt phase of defendants' trial.
- The district judge erred when he rejected defendants' challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to the State's peremptory strike of juror and eventual foreperson W.B.
- The district judge erred under the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), when he admitted statements by Walenta.
- The instructions on all four K.S.A. 21-3439(a)(4) sex-crime-based capital murders were erroneous.
- The convictions on three of four K.S.A. 21-3439(a)(6) multiple-death capital murders were multiplicitous.
- The convictions on the victim-on-victim rape and attempted rape offenses were void for lack of subject matter jurisdiction.
- Count 42 was multiplicitous with Count 41.
- The district judge erred when he misapplied the third-party evidence rule and hearsay

exceptions, preventing R. Carr from presenting his defense.

- The district judge erred by automatically excluding eyewitness identification expert testimony proffered by the defense.
- The district judge erred when he instructed the jury to consider an eyewitness' degree of certainty when assessing that witness' reliability.
- The instruction on aiding and abetting was erroneous.

With our standard of review in mind, we first consider which of the 11 identified errors carry any weight in our harmless error analysis. Significantly, 4 of the 11 errors carry no weight. Although we found the instructions regarding the sex-based capital murders to be erroneous, the multiple capital convictions multiplicitous, the victim on victim offenses void, and Counts 41 and 42 multiplicitous, we have cured these errors by vacating the convictions directly arising from these errors. See *State v. King*, 297 Kan. 955, 987, 305 P.3d 641 (2013) (discussing cumulative error, refusing to weigh impact of instructional, multiplicity errors already cured through reversal of affected convictions). Any indirect impact these errors may have had on the remaining convictions is negligible, at best, and does not factor into our analysis.

Similarly, the weight of the erroneous admission of Walenta's statements is negligible given that this error directly affected only the convictions arising from that incident, and we easily held the error harmless because

the critical information contained in Walenta's statements otherwise was lawfully admitted.

Likewise, there was limited potential impact from the aiding and abetting instruction's failure to convey that the aider and abettor must have premeditated the killings he assisted. There can be no question that both defendants intended and premeditated the killings when the facts demonstrated that they jointly herded their victims to the garage and forced them at gunpoint into two vehicles, strategically arranged and rearranged the victims between the cars, ultimately placing the three male victims in the trunk of one vehicle, jointly drove the two cars to a remote location, and had a conversation between themselves before assisting one another in arranging the victims on the snow-covered ground. Significantly, neither man protested as the victims were shot, execution-style, one after another.

This leaves us with five errors that carry weight. Four of these errors are interrelated and affected the defendant's ability to argue that he did not participate in the crimes—the failure to sever the trials, the erroneous application of the third-party evidence rule, the erroneous exclusion of expert testimony on eyewitness identification, and an erroneous eyewitness identification instruction. The remaining error, the reverse *Batson* error, more broadly affected the trial. But the combined weight of these individually harmless errors pales in comparison to the strength of the evidence against the defendants.

Indeed, the evidence of both of the defendants' guilt of the Birchwood offenses was not simply strong; it was nothing short of overwhelming. The evidence

supporting the defendants' guilt need not be recounted in detail. Suffice it to say that biological evidence, in addition to other physical evidence, heavily implicated both defendants. Most notably, J. Carr's seminal fluid was collected from Holly G., and both Holly G.'s and Heather M.'s DNA matched DNA found in J. Carr's boxer shorts. Similarly, material found on Holly G's thigh implicated both R. Carr and J. Carr. And Heather M.'s blood was found on R. Carr's undershorts.

This highly persuasive biological evidence coupled with other substantial physical evidence of guilt—such as footprints matching R. Carr's found at the Birchwood residence; both men's possession of property stolen from Birchwood, including cash and two vehicles—and the highly persuasive circumstantial evidence of guilt—such as R. Carr's attempt to flee and the clothing J. Carr wore when arrested lead us to conclude that any effort by either brother to suggest that he was not involved in the Birchwood crimes would be futile.

After weighing the cumulative errors from the trial against the overwhelming evidence of defendants' guilt, we remain unshaken in our confidence in the jury's verdicts. And, although we focus on the Birchwood crimes, having examined the entire record, we conclude beyond a reasonable doubt the cumulative impact of the multiple errors was harmless as to all of the verdicts we affirm today. Consequently, we hold the cumulative impact of those errors does not require reversal of any more of R. Carr's convictions.

CONCLUSION FOR GUILT PHASE

For the reasons set forth above, we affirm R. Carr's capital murder conviction under Count 2. We reverse his three remaining capital murder convictions based on the alternative theories under K.S.A. 21-3439(a)(4) and (a)(6).

We affirm R. Carr's convictions on Counts 9 through 24. Because four pairs of these counts were charged in the alternative, this results in affirmance of 12 rather than 16 convictions.

The convictions based on Counts 25, 26, and 29 through 40 are void for lack of subject matter jurisdiction. We affirm the convictions based on Counts 27 and 28.

We affirm R. Carr's conviction on Count 41. We reverse his conviction on Count 42 because it is multiplicitous with Count 41.

We affirm R. Carr's convictions on Counts 43 through 58.

PENALTY PHASE ISSUES AND SHORT ANSWERS

Our majority decision to affirm one of R. Carr's death penalty-eligible convictions—that based on Count 2 for the murders of Heather M., Jason B., Aaron S., and Brad H. under the multiple-homicide theory of K.S.A. 21-3439(a)(6)—requires us to address several of his penalty phase questions. Again, we have taken the liberty of reformulating certain questions to focus on their legally significant aspects or effects. We also have reordered questions raised by R. Carr and have inserted among them any unassigned potential

error noted by us, because we believe this organization enhances clarity. We number all questions consecutively, this time, P1 through P20.

Our statement of each question is followed by a brief statement of its answer or our other response.

Because we conclude on the first question that R. Carr's remaining death sentence must be vacated and the case remanded, we need not reach the merits on all of the other questions. On those questions on which we do reach the merits or otherwise provide guidance on remand, we need not analyze and discuss whether any error, standing alone, would have compelled vacation of the death sentence. Nor need we discuss cumulative error.

P1. Did the district judge err in refusing to sever the penalty phase of the defendants' trial? A majority of six members of the court answers this question yes. One member of the court dissents and writes separately on this issue. A majority of six members of the court agrees that this error requires R. Carr's remaining death sentence to be vacated and the case remanded. One member of the court dissents and writes separately on this issue.

P2. Despite compliance with K.S.A. 21-4624(a), was it constitutional error to omit the four aggravating circumstances asserted by the State from the amended complaint? To provide guidance on remand, the court unanimously answers this question no.

P3. Did the four aggravating circumstances asserted by the State adequately channel the jury's discretion in arriving at the sentence of death? To provide guidance

on remand, the court unanimously answers this question yes.

P4. Does the unavailability of a transcript of the jury view deprive R. Carr of a meaningful opportunity for appellate review of his death sentence? To provide guidance on remand, the court unanimously answers this question no.

P5. Does K.S.A. 21-4624(c)'s allowance of testimonial hearsay (a) offend the heightened reliability standard applicable in death penalty cases or (b) violate the Confrontation Clause of the United States Constitution and *Crawford*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)? To provide guidance on remand, the court unanimously answers the first question no. The court unanimously answers the second question yes.

P6. Did the district judge err in excluding mitigating evidence of (a) likelihood of parole or (b) the anticipated impact of R. Carr's execution? To provide guidance on remand, the court unanimously answers the first question no. The court discusses the standard that should govern consideration if the second question arises again.

P7. Did the district judge err by permitting the State's rebuttal witness to testify that he had consulted other experts and that they agreed with his opinion? To provide guidance on remand, the court discusses the standard that should govern consideration if this question arises again.

P8. Did the district judge err in denying an opportunity for surrebuttal testimony? The court unanimously agrees that the district judge abused his

discretion. The court declines to reach the issue of harmlessness because of the necessity of remand.

P9. Must R. Carr's sentencing on his noncapital convictions have occurred before the penalty phase of his trial, and, if so, should the jury have been informed of the sentences he would serve if he were not sentenced to death? The court declines to reach the merits of the first part of this question because it is moot and, to provide guidance on remand, unanimously answers the second part of the question no.

P10. Did the district judge err in failing to instruct the jury that the existence of mitigating factors need not be proved beyond a reasonable doubt? To provide guidance on remand, a majority of five members of the court answers this question yes. Two members of the court dissent, and one of them writes separately for the two on this issue.

P11. Did the district judge err by failing to instruct jurors that "the crime" to be considered when evaluating aggravating circumstances was capital murder? We discuss this issue to provide guidance on remand.

P12. Was the jury instruction on the role of mercy clearly erroneous? To provide guidance on remand, the court unanimously answers this question no.

P13. Did the wording of Instruction 10, when read with the verdict forms, misstate the law on the need for jury unanimity on mitigating factors not outweighing aggravating factors? To provide guidance on remand, the court unanimously answers this question yes.

P14. Must R. Carr's death sentence be vacated because a fact necessary to imposition of the penalty—his age of 18 or older at the time of the capital crime—was not submitted to the jury or found beyond a reasonable doubt? The court declines to reach the merits of this issue because the situation that prompted it is unlikely to arise again on remand.

P15. Did the district judge err in failing to give a "no adverse inference" instruction? The court declines to reach the merits of this issue because the situation that prompted it is unlikely to arise again on remand.

P16. Does K.S.A. 21-3205 authorize punishing an aider and abettor the same as a principal? The court declines to reach the merits of this issue because the record on appeal does not demonstrate that R. Carr was convicted of capital murder as an aider and abettor.

P17. Is the death penalty an unconstitutionally disproportionate punishment as applied to aiders and abettors of capital murder under Section 9 of the Kansas Constitution Bill of Rights? The court declines to reach the merits of this issue because the record on appeal does not demonstrate that R. Carr was convicted of capital murder as an aider and abettor.

P18. Was the penalty phase infected by prosecutorial misconduct? The court declines to reach the merits of this issue because the situation that prompted it is unlikely to arise again on remand.

P19. Do verdict forms such as those used in this case pose a threat of double jeopardy? The court declines to reach the merits of this issue because it is unripe.

P20. Does Kansas' execution protocol protect against unnecessary pain? The court declines to reach the merits of this issue because it is unripe.

FACTUAL AND PROCEDURAL BACKGROUND FOR PENALTY PHASE ISSUES

The day after the completion of the guilt phase of defendants' trial, the penalty phase of their trial began.

At the beginning of the penalty proceeding, Judge Clark raised a question about whether courtroom security should be increased in keeping with increased jail security due to the defendants' convictions. Specifically, he asked whether J. Carr should wear leg restraints in the courtroom. The judge acknowledged that J. Carr had not misbehaved, but he nevertheless ordered that he wear the restraints while in court, providing that they be placed so they could not be observed by the jury.

Meanwhile, counsel for R. Carr informed the judge that his client was no longer willing to cover the handcuffs he was ordered to wear with a sweater. The judge permitted R. Carr not to use the sweater, but he admonished him that, if the jury saw the handcuffs, any later allegation of error arising from that view would be regarded as invited by R. Carr.

The State's Case-in-Chief

The State elected to rely on the evidence from the guilt phase of the defendants' trial as its case-in-chief during the penalty phase. It asserted the existence of four aggravating circumstances in the capital murders of Heather M., Aaron S., Brad H., and Jason B.: Defendants knowingly or purposely killed or created a

great risk of death to more than one person; defendants committed the crimes for themselves or another for the purpose of receiving money or any other thing of monetary value; defendants committed the crimes in order to prevent a lawful arrest or prosecution; and defendants committed the crimes in an especially heinous, atrocious, or cruel manner.

The Defense Case

Defense witnesses testified about the defendants' dysfunctional upbringing and their psychological profiles.

Family History

Defendants' mother, Janice Harding, testified that she and the defendants' father, Reginald, Sr., were 16 and 17 years old when their first child, Temica, was born in Cleveland, Ohio, in 1974. Temica lived with her paternal grandmother for the first year of her life. When Harding turned 18, she and Reginald, Sr., married. They then had three more children: R. Carr in 1977, Regina in 1979, and J. Carr in 1980. All of the Carr children were born prematurely, and J. Carr cried so much from infancy through his late preschool years that he was called "Screaming Man" by his mother and other family members.

Despite the 3-year age difference between her sons, Harding said that R. and J. Carr were "always real close," and J. Carr looked up to R. Carr.

Regina developed a cancerous tumor when she was 2 years old and died before her third birthday. Harding testified that the family deteriorated after Regina got sick. Harding "fell out" with her mother-in-law, who

reported Harding and Reginald, Sr., to child protective services after seeing bruises on Regina's legs and arms and across her chest. Harding claimed the child protection case was dismissed because the bruises had been caused when family members had to hold Regina down to administer chemotherapy drugs. However, according to Dr. Michael Cunningham, a forensic psychologist who testified as a defense expert for J. Carr, Harding's mother-in-law, Dorothy Wiley, had described taking Regina into her care because her parents were not clothing her properly. Wiley said she called child protective services after observing spoon-shaped bruises on Regina.

After Regina's death, Harding and Reginald, Sr., began drinking heavily and fighting. The fights, according to Harding, involved screaming and hitting. Although Harding said the fights never took place in front of the children, she acknowledged that they may have seen them. Temica testified that she saw her father beat her mother with a stick. There was other testimony about Reginald, Sr., chasing Harding with a brick and about Harding hitting him with a baseball bat.

In addition to fighting with Reginald, Sr., Harding often disappeared, sometimes for several days at a time. Harding denied being romantically "involved with anyone in particular." She said she was just "kind of leaving to get away from" Reginald, Sr. Harding said she did not tell her children when she was leaving; she just packed up and went. She also admitted there were times when she left her children alone in the house, going out to a club with a neighbor after she put them to bed. Nevertheless, Harding described herself as a

"stay-at-home" mom who "cooked every day, cleaned house, did laundry," and she said that Reginald, Sr., "worked, paid all the bills[;] nothing was behind."

Temica testified about her mother staying out and not coming home in this period. When Harding did come home, Temica said, she would stay a couple of days and then leave again. During these episodes, either Reginald, Sr., would take care of the children, or he would take them to an aunt's house.

Other family members also described Harding's unpredictable disappearances from home while her children were growing up. Cunningham testified that a paternal aunt described Harding as "promiscuous," saying she went to clubs and failed to come home at night. After days or weeks, the aunt said, Harding would return with "incredible stories about how she had been ill or had been in the hospital, even though the family had seen her at nightclubs, coming out of nightclubs, during the time that she was reporting to them that she had been in the hospital."

Divorce and Abandonment by Father

Harding and Reginald, Sr., separated when R. Carr was 5 or 6, then divorced. Reginald, Sr., remarried 2 months after the divorce and eventually lost all meaningful contact with his children from his first marriage.

R. Carr had always been his father's favorite. In the opinion of Harding's sister, pediatrician Phyllis Harding, the divorce affected R. Carr more than the other children. Temica recalled that, as a youngster, R. Carr missed his father and cried often for him. Grief would turn to anger when his father promised to visit

and failed to appear as arranged. In particular, both Temica and his mother recounted that when R. Carr was in his early teens and having trouble in school, arrangements were made for him to go to California to live with his father. Although R. Carr had a ticket for the trip, his father called the day his son was supposed to leave and said that he could not come to California after all. R. Carr saw his father only one time after that disappointment.

Temica herself last saw her father when she was in fourth or fifth grade. He refused to accept a collect telephone call from her on the night before she testified.

Post-Divorce Atmosphere

After the divorce, Temica testified, her mother also was not available to her children. She was "never at home, never at home [I]t was just me, Jonathan and Reginald there, period." At one point, Harding began staying frequently with her future husband, Rick Austin, at his parents' house.

When she was home, Harding was described as "holing up" in her bedroom and generally unaffectionate with her children. Cunningham reported that Harding would emerge from her bedroom, fix dinner, leave it on the stove, and carry her plate back to the bedroom, where she and Austin would remain, typically with the door shut. If the children wanted to interact with either Harding or Austin, they would have to knock on the door and sometimes have to talk through it.

Temica said she believed Austin was involved in chopping down stolen cars and was hiding from law

enforcement. Harding testified that Austin once threatened her with a gun, which "pissed off" R. Carr, who did not like Austin.

Temica also testified that, sometime after the divorce, her mother "just sent me to California" to live with her aunt, Phyllis; Temica did not know why. Temica attended fifth and sixth grades in California, and her mother never visited her while she was there. R. and J. Carr also were "shipped off," Temica said; J. Carr went to Brownsville, Texas, at one point, and R. Carr was sent to West Virginia. Temica could not recall where she was living during these periods, saying, "I could have been living with anybody."

Temica described eventually getting a job at 15 or 16 and buying school clothes for her brothers, as well as preparing many evening meals and attending school conferences when J. Carr experienced learning problems. When she told her mother that she did not think Harding loved them anymore, Harding beat her. Temica said R. Carr believed Harding did not like him because he had dark skin.

Temica attributed her mother's eventual move from Ohio to Dodge City to what she believed were Austin's illegal activities. She said that R. Carr would have been 13 or 14 years old at the time of the move. Phyllis, had moved to Dodge City about a year earlier, and Austin eventually moved to Dodge City as well. He and Harding had been married 8 years by the time of Harding's testimony.

Because Temica was a senior in high school and wanted to graduate with people she knew, she resisted moving to Dodge City. Her mother left her in Ohio with

"some guy named Patrick," whom Temica had never met until her mother packed her things and took her to stay with him. Temica would not be reunited with her two brothers until years later, when R. Carr came home after a release from prison in March 2000.

Methods of Discipline

To discipline her children when they were growing up, Harding said, she spanked her kids "the same way my momma spanked me." This meant she used belts, a house shoe if there was one around, and, occasionally, an extension cord. The belts had names such as "Heat Daddy," and the children would be required to choose the one she would use for a spanking.

Temica testified that whoever was getting a "whooping" would have to lie on the floor in his or her underwear, and the two other children would hold down his or her arms and legs. Temica described one occasion when she was required to take off all of her clothes and take the sheets off a bed. She was then placed on the bed like an "X" and beaten. If the child receiving the beating got up from being held down, then he or she received additional physical punishment.

The defendants' cousin, Phyllis' adopted daughter, Barbara, testified that she remembered being disciplined by Harding as well—with belts, spoons, or an electric cord. She also remembered that one of the other children would hold her legs down. Cunningham testified that J. Carr and Temica both described that their mother's whippings with a belt or extension cord would leave them with welts, bruises, and blood blisters on their backs, legs, or buttocks.

Further defense testimony supported the idea that child maltreatment results in a desensitization to violence and is a major risk factor for future criminality and violence when the child becomes an adult.

Substance Abuse

Harding testified that she and Reginald, Sr., smoked marijuana on weekends, but, as far as she knew, the children were unaware of their drug use. Harding also told Dr. Thomas Reidy, a forensic psychologist who evaluated and testified for R. Carr, that she had used cocaine. J. Carr reported to Cunningham that he had seen his mother smoke marijuana. Cunningham testified that a parental model for drug use is "a broad risk factor, social and psychological risk factor, for relationship problems, for self-control problems, for feeling of defectiveness, psychological disorders and criminal behavior as well."

Cunningham testified that a paternal cousin who grew up with Harding's children reported that Temica told her when they were 10 or 11 years old that Harding and Austin would do drugs in Harding's bedroom. Cunningham also said that two of J. Carr's peers had told him while he was an adolescent that they sold crack to his mother.

Cunningham testified that accounts from family members led him to believe that Reginald, Sr., was an alcoholic. A sister of Reginald, Sr., said he was routinely drunk when he came to live with her after his marriage with Harding collapsed. Her daughter described this as well, remembering in particular that Reginald, Sr., would drink cough syrup by the bottle.

J. Carr told Cunningham that he had been given Thunderbird wine mixed with grape Kool-Aid by an uncle at age 8. R. and J. Carr visited the uncle weekly and all three would get drunk. The uncle and R. Carr often would have a girl there as well, while J. Carr would drink until he passed out.

J. Carr first smoked marijuana at age 13 with R. Carr. They would smoke "blunts," cigar-like rolls of marijuana, "every day, all day." After R. Carr was released from prison in March 2000, he and J. Carr smoked marijuana heavily together.

J. Carr also reported using hallucinogenic mushrooms routinely for about a month when he was 18 years old, but he stopped because he was getting delayed hallucinations. He also described smoking "wet"—tobacco or marijuana cigarettes dipped in a mixture of PCP "and typically embalming fluid"—at age 19.

R. Carr had started using drugs at an early age, and he attended school "stoned" during eighth and ninth grades. He was holding drugs for drug dealers by age 11, and selling drugs by age 13. He was using alcohol heavily by age 16.

Harding described police execution of a search warrant for drugs at 3 or 4 a.m. when R. Carr was about 15 years old. She said he was locked up for a probation violation when he was 16 because a urinalysis showed marijuana use. Harding also said she kicked R. Carr out of her house when he was 16 or 17 because she was under the impression he was selling drugs and "didn't want that in the household."

In 1995, R. Carr was arrested for drug possession. After conviction, he was incarcerated at Norton Correctional Facility for 5 years.

J. Carr told Cunningham that he and R. Carr had smoked 4 to 5 blunts in the 24 hours before the Birchwood crimes and had split two fifths of cognac between noon and the 11 p.m. entry into the triplex. J. Carr also told Cunningham that he had smoked "wet" from 30 minutes to an hour before the series of Birchwood crimes began.

Childhood Sexual Abuse and Behavior

The defendants' paternal aunt said that each had come to her separately and told her that the other was being sexually abused by one of their mother's boyfriends; but each denied it when she spoke to him directly. Temica testified that she had heard her brothers were forced to have oral sex with her mother's boyfriends. She also testified that, when she was a child, her father sexually abused her, including fondling and attempted rape. She said she never told anyone but thought R. Carr might know because "Reginald pays attention to people."

A paternal cousin also reported that she had been sexually abused as a child by R. Carr, Sr., and her mother verified her report.

Cunningham testified that J. Carr reported to him that, when he was about 6 or 7 years old, R. Carr prompted a peer-age girl named Amber to begin having sexual contact with J. Carr. Apparently the girl had already been involved with R. Carr. Harding appeared to excuse this aspect of R. Carr's early sexual activity by calling the girl "promiscuous." Temica also

confirmed J. Carr's report of his involvement with the girl.

Barbara, who grew up with the defendants, testified that her maternal uncle, Michael, sexually abused her when she was 6 years old. Phyllis denied that the defendants' uncle Michael had abused her daughter. Barbara said she did not report the abuse to her mother and grandmother until she was 15, and they both called her a "lying bitch."

Barbara also testified that she had sexual contact with R. Carr, starting when she was 7 years old. She said R. Carr was perhaps 9 years old at the time. This contact continued for a few years, stopping when R. Carr was in high school. She also reported sexual contact with Temica.

R. Carr discovered explicit pornographic photographs of his mother when he was 13 years old, and he was suspended from school during the eighth grade for sexually harassing a teacher.

Rape Accusation and Suicide Attempts by J. Carr

In 1989, when J. Carr was in the third grade at Harvey Rice School in Cleveland, a girl in the school accused several boys, including J. Carr, of raping her. The case was dubbed the "Harvey Rice rape case," and the boys' names were mentioned in the newspaper. As a result, J. Carr was teased and called names by schoolmates. Eventually, the girl's accusation was exposed as false.

J. Carr reported to Cunningham that, after the Harvey Rice allegation, his father began bringing him back early from visitation and then quit visiting with

him at all, despite maintaining visitation with his brother. Harding sent him to live with Phyllis in Brownsville for more than a year; Harding said she did not visit J. Carr during that time because she "didn't have the monies to travel."

Eventually, J. Carr became so despondent over the incident that he tried to hang himself. At age 17, after dogs that J. Carr was fond of accidentally drank antifreeze and died, J. Carr again attempted to commit suicide—by drinking antifreeze. Harding thought J. Carr also was upset at the time because R. Carr had been sent to prison. After the second suicide attempt, J. Carr went to Ohio to live with a maternal uncle.

R. Carr's Teen Years and Early Adulthood

When his family moved from Cleveland to Dodge City, R. Carr initially adjusted well. He had many friends and was involved in extracurricular activities. He liked to draw and write poetry. He had an aquarium in his room and a pet dog.

But, as R. Carr got older, he began to struggle in school—fighting and getting suspended. He finally was expelled when he was 17 and sent to an adult education program. He passed his GED examination with high scores.

About the same time, R. Carr became a father for the first time. His first son was born to Richelle Cossman in November 1994.

R. Carr began taking classes at a local community college, with the goal of becoming an X-ray technician, but his studies came to an end when he was arrested for robbing the college bookstore. He was placed in

community corrections, but he violated his probation by smoking marijuana and was jailed for several months.

After release, R. Carr was seeing Amanda Lyons. But he was soon arrested again for possession of drugs. He was convicted of drug possession, theft, aggravated assault, and obstruction of legal process. He was held in the county jail until he turned 18, then sent to Norton, where he remained until he was 23. R. Carr was released from Norton on March 28, 2000.

Lyons' first child with R. Carr, another son, was born in December 1996, when R. Carr was 19 years old and in prison in Norton. The couple married in May 1997, and their second child, a daughter, was born in April 2001, while R. Carr was awaiting trial in this case.

Harding believed that prison changed her son. She said that he had been outgoing, had kept his room clean, and was mannerly and respectful before he was in prison. After his release, he was "standoffish." Other family described him as "hardened" by the experience of prison. They reported that he started going by the name of "Smoke" while in Norton.

Despite his incarceration, R. Carr maintained a relationship with both of his sons. Lyons brought both boys to Norton regularly for visits. When not in prison, R. Carr had exercised regular visitation with his oldest son and had taught him how to ride a bicycle. At the time of trial, his younger son was worried about where his father was sleeping and what he was eating. R. Carr would draw pictures for his children, and his boys wrote letters, made cards, and drew pictures for their father. Cossman and Lyons said that R. Carr's

children would continue to have relationships with him, if he were to be incarcerated rather than executed.

R. Carr was arrested for driving under the influence in Dodge City on November 19, 2000, and bonded out the same day. He was arrested again 9 days later on a Department of Corrections warrant for a parole violation. Because of a mistake in calculating his good-time credit on his 1996 prison sentence, the Department declared that his parole expired on December 1, 2000, when it should have continued until June 1 of the following year. As a result, the Department withdrew its parole violation warrant. Even though R. Carr also was being held in jail in Ford County on a forgery charge, the withdrawal of the warrant enabled him to bond out again, this time on December 5, 2000, 2 days before the Schreiber incident.

R. Carr's Evaluations and Expert Testimony

Dr. Mitchel Woltersdorf, a clinical neuropsychologist who diagnoses brain disorders, put R. Carr through a battery of tests. R. Carr's MRI and EEG were normal. But Woltersdorf diagnosed him with brain damage, evidenced by significant differences in levels of mental functioning that should be relatively equal. For example, R. Carr had a verbal scale IQ of 86, while his performance scale IQ was 111. Normal point spread would be 5 to 7; a 25-point difference occurs in less than 3 percent of the population. R. Carr also had a 19-point difference between his verbal comprehension score of 84, which reflects left brain hemisphere skill, and his perceptual organization score of 103, which reflects right hemisphere skill. That great a difference occurs in about 14 percent of the population. Woltersdorf said that R. Carr also demonstrated "huge"

differences in memory and visual testing; these differences were "way too large" for a normal brain.

According to Woltersdorf, the type of brain dysfunction R. Carr suffered from was not consistent with the type of damage caused by drug or alcohol abuse. Rather, he probably suffered significant head trauma or traumas, most likely during the first 8 or 9 years of his life. The doctor could not say if the brain damage was due to abuse or was related to birth trauma. There was evidence that, at one point during their childhoods, J. Carr had shot R. Carr in the head with a BB gun.

Woltersdorf testified: "A person with a head injury has to make some wise choices to prevent that head injury from ruining [his or her] life." If R. Carr were an ordinary patient, he would need to be placed on medication for mood control and anger control, and he would be counseled about a traumatic brain injury "lifestyle, swearing off caffeine, illicit substances, alcohol." Consumption of caffeine, drugs, and alcohol can make a person with a head injury violent and aggressive.

Woltersdorf also tested R. Carr's emotional status. He found that he suffered from depression, antisocial personality disorder, distrust, and paranoia. In Woltersdorf's opinion, R. Carr's condition was chronic: "[I]t's been there forever."

The antisocial personality disorder also showed up in problems with anger management and difficulties with authority, Woltersdorf said. He emphasized that R. Carr did not choose the disorder. "It's something that he was given, so to speak, in life, somewhere

between birth and the fifth year of life it eventually manifests itself by the adolescent years."

Reidy, the forensic psychologist, prepared a social history for R. Carr. He echoed Woltersdorf's statement that family circumstances are usually the cause of the development of an antisocial personality disorder, noting that families are the strongest socializing force in life, and "deviance begins at home." He said: "The quality of attachments to the parents and other members of the family during childhood is central to how the child will relate to and value other members of society as an adult." Reidy looked at how R. Carr went from being a happy toddler, a "good kid" who liked to push a vacuum cleaner around, to a young adult convicted of four counts of capital murder.

Consequences of parental abandonment and neglect, Reidy said, included

> "damage to one's identity, lowered esteem, various and sundry psychological disorders, anxiety disorders, depression particularly [,a]cademic deficits, impaired capacity to trust and care for others[, d]eficient identification with social ideals. One—in this kind of environment, one tends to become morally corrupt and then various kinds of problematic, delinquent, violent behavior can occur."

Reidy also testified that inappropriate sexual exposure at an early age also has lasting negative effects. The long-term risk is "disturbed sexual behavior" that gets expressed in a variety of ways in adulthood. One expression of disturbed sexual behavior is "deviant sexual hyperarousal." This occurs when

"[s]ex is viewed as a means of power and control, very much like a rape scenario." Early sexual exposure can lead to impaired sexual impulse control and can cause repetitions and re-enactments of sexual victimization. In sum, R. Carr grew up in a "sexually perverse family atmosphere," Reidy said. This upbringing was likely to leave R. Carr with a distorted view of maleness and sexuality.

Reidy identified other risk factors and consequences for a negative outcome in R. Carr's life, including early aggression and violent behavior evidenced by fights starting at a young age and early gang affiliation; antisocial behavior and attitudes as reflected in arrests for robbery, battery, drug and alcohol use, holding drugs for dealers, and stealing; and emotional and physical abuse. He said that R. Carr's developmental trauma was severe and that protective factors were minimal to nonexistent.

Evaluation of J. Carr

Harding testified that she learned J. Carr was dyslexic when he was in third grade, right before he was sent to live with Phyllis in Brownsville. She also said he had trouble passing grades during his middle school years and was kept back in seventh grade.

Cunningham's testing measured J. Carr's current abilities at the second- or third-grade range. J. Carr had told Cunningham that he tried to disguise his inability to read in elementary school by avoiding or refusing to read aloud; when he was forced to read aloud, he was ridiculed by his classmates. He finally dropped out of school in tenth or eleventh grade.

Cunningham characterized J. Carr as emotionally disturbed from early childhood on. Cunningham identified the family situation—involving physical and sexual abuse, parental neglect, and emotional detachment—and a genetic predisposition to mental illness and substance abuse as likely contributors to J. Carr's pattern of emotional instability.

Cunningham testified that the family history showed that Harding's solution to her children's increased need, even in the greatest of crises, was to send them to someone else's household. Cunningham said that it was important for a child to be with his brothers and sisters as well as his parents, because "when you move a child from one placement to another, particularly when you disrupt those sibling relationships as well, you are doing grave emotional harm to this child."

Cunningham testified that the neglect Jonathan experienced growing up was not primarily physical in nature. Rather, there was "an issue of very significant emotional neglect, of an absence of attachment and bonding to parents, of affection, of continuity of care, later on[,] of supervision and guidance."

Cunningham testified that parental detachment such as that in the defendants' home had "ominous implications" for the quality of Harding's relationship with her children, how she sees herself as a mother, and "the quality of her responsibility to these kids."

Cunningham also spoke about Harding's methods of discipline. In his view, although it is damaging for a child to observe violence in the home, it is worse "to be made a party to it you are the one that's helping

administer this abuse, [and it] magnifies the emotional[ly] damaging effects of it."

Cunningham also documented that J. Carr had a serious go-cart accident at age 15, which caused a concussion with unconsciousness of an hour or more and merited a hospital admission.

Cunningham said that he had documented a susceptibility to mental illness stemming from the maternal side of J. Carr's family. Both the maternal grandmother and maternal uncle Michael had significant histories of mental illness. Phyllis described her mother's repeated admissions to state mental hospitals and her noncompliance with medication that prevented her from becoming angry and ranting and raving. Barbara testified that her uncle Michael never took baths and used to "[w]alk around the house with his pants open so you can see his genitals." Michael also exhibited symptoms similar to his mother's, including unpredictable, explosive anger and noncompliance with his medication regimen.

Given significant developmental abuse and neglect, disruptive relationships, and the fact that J. Carr was carrying around a lot of emotional pain as he entered adolescence, Cunningham testified, J. Carr was a prime candidate to "self-medicate" with drugs and alcohol.

Cunningham said that J. Carr also told him that R. Carr was involved with a gang, but J. Carr nevertheless looked up to his older brother. Family members also said that R. Carr influenced J. Carr as they grew up. Temica, specifically, said that R. Carr would ridicule J. Carr as weak, calling him a "wuss"

and other disparaging names when he did not do something R. Carr wanted him to do.

Harding said that she warned J. Carr to stay away from R. Carr when he got out of prison because J. Carr would "end up getting in trouble." Her younger son, she said, was "a little different when he's with Reggie."

Using a United States Department of Justice study of risk factors that increase the likelihood of involvement in criminal violence, Cunningham found J. Carr had 18 or 19 out of approximately 22 risk factors. On protective factors, J. Carr exhibited some elements of positive social orientation. Regarding a second study breaking risk factors into categories of individual, family, social, peer, community, and neighborhood, Cunningham found J. Carr had a majority of the risk factors in each category. He said that other risk factors were J. Carr's age and learning disabilities.

Cunningham summed up the factors leading to J. Carr' s participation in the crimes as a combination of "some very problematic genetic predispositions," in addition to "neurological abnormalities," "a catastrophic family setting" leading to "substance abuse and disturbed adjustment that are aggravating each other during adolescence. Out of that, you have the influence of his older brother and intoxication at the time. And from that, you have the capital offense."

Testimony of J. Carr's Friends

Three of J. Carr's friends testified for him during the penalty phase of the trial.

Leroy and Juanita Culver knew J. Carr when he lived in Dodge City. Jesse Harris knew J. Carr in Ohio through his daughter, who was J. Carr's girlfriend.

J. Carr worked for Leroy for 3 or 4 years. Leroy said that J. Carr was a good worker who wanted to learn and that he was "looking for affection" from somebody. Juanita described J. Carr as "one of the nicest, polite, kind, warm, giving, always—he was the epitome of the finest young man you could find."

Jesse Harris said that J. Carr stayed with his family in Cleveland and that, at some point, he became engaged to his daughter. He never had harsh words or any trouble with J. Carr. He described him as "a real quiet young man," whom he treated "like one of my own sons."

Defendants' Roles in Quadruple Homicide

During her testimony in the penalty phase, on questioning from J. Carr's counsel, Temica said that R. Carr admitted to her that he shot "those people," referring to Heather M., Aaron S., Brad H., and Jason B.

There was no testimony from any witness that J. Carr admitted to shooting the victims of the quadruple homicide, but the prosecution made reference to J. Carr claiming to have been the triggerman while he was in jail. During the State's closing argument, when the claim was mentioned again, and defense counsel objected to facts not in evidence, Judge Clark sustained the objection.

Dueling PET Scan Experts and Denial of Continuance for Surrebuttal

The defense presented testimony from Dr. David Preston, a specialist in nuclear medicine who was qualified as an expert for the defense at the penalty phase regarding PET imaging and its use as a diagnostic technique. Preston said that a PET scan of a person's brain is not accepted to predict or explain criminal behavior, but he did identify what he said were abnormalities in both R. Carr's and J. Carr's scans. Specifically, he said images of their temporal lobes demonstrated marked deficits in metabolism in the regions of the hippocampus and amygdala.

Preston testified that Exhibit A-39, an image of R. Carr's brain, and Exhibit JC-2, an image of J. Carr's brain, displayed images that were higher in back and lower in front to give a larger view of their temporal lobes. He also admitted on direct examination that he had mistakenly classified Exhibit A-40 as a PET scan of a normal young male for comparison purposes. In fact, it was an image of a 50-year old male with a memory problem.

Preston further testified that, in patients he has seen in the past, a closed head injury would be the first thing he would suspect as a cause of the type of deficits he observed in the defendants' scans. But he said that no history of closed head injuries was provided to him in this case.

The State called Dr. Norman Pay, a neuroradiologist, in rebuttal to Preston. On direct examination, Pay testified that he consulted with the person at Via Christi Medical Center who performed

the PET scans on the defendants, the doctor in charge of PET scans at Via Christi, and a neurologist at Via Christi. The State had Pay identify these colleagues, who were in the courtroom, and asked each of them to raise a hand, which they did. Pay said all three were in agreement with him that Exhibits A-39 and JC-2 were skewed in color and were manipulated so that the anterior portion of the temporal lobe, which includes the amygdala, would not appear in the images. When the prosecutor asked Pay if the manipulated images were "by design," he responded, "We were told."

Pay further testified that, looking at all of the PET images, he and the others he consulted had reached the opinion that the scans showed normal metabolism in both defendants' brains.

J. Carr's counsel objected to admission of opinions from Pay's colleagues in the courtroom, but the objection was overruled.

On cross-examination, Pay admitted that he normally does not read PET scans, despite being asked to do so in this case. He said that the difference between JC-2 and State's Exhibit 912, another of J. Carr's PET scan images on which he was relying to give his opinion, might be the presence of "scatter" in 912. Scatter can produce a halo effect that can be eliminated by reducing the background color.

When asked if he could tell whether Preston had manipulated the images so that they would be higher in back and lower in front, Pay responded, "You know, we have to have Dr. Preston here to testify because I don't really know what he did." Pay agreed that if two dots in one of the images were indicative of J. Carr's

eyes, it might necessarily involve the area of the hippocampus and amygdala. He also testified on cross-examination that he did not attempt to contact Preston to ask him how he arrived at his conclusions and that he was not there to cast any aspersions on Preston's integrity or competence.

The defense requested a continuance to confer with Preston and recall him as a witness in surrebuttal. Counsel argued that he must be permitted to address the State's allegation that he manipulated the PET images "by design."

Judge Clark characterized the disagreement between Preston and Pay as "a fact question for the jury . . between experts" and said that Preston "would be repeating what he had said in direct." He denied the motion for continuance.

In closing argument, one of the prosecutors argued that the "truth" as revealed by the "doctors" showed that Preston's "slick" PET scan images and related testimony were "hocus pocus." The prosecutor said that the "foundation of the [defendants'] sympathy and abuse excuse and blame" had come "crashing down" and that they were simply dragging their "laundry" into court.

Additional facts necessary to resolution of particular legal issues will be discussed below.

P1. SEVERANCE

R. Carr challenges Judge Clark's failure to sever the penalty phase of his trial from the penalty phase of J. Carr's trial. The failure to sever, R. Carr asserts, violated his Eighth Amendment to the United States

Constitution right to an individualized capital sentencing determination and requires us to vacate the death sentence on the remaining capital conviction and remand the case for further proceedings. J. Carr makes at least one distinct argument in favor of severance of the penalty phase: He asserts the joint trial inhibited the jury's individualized consideration of him because of family characteristics tending to demonstrate future dangerousness that he shared with his brother.

Although R. Carr's visible handcuffs are not specified as another source of prejudice to J. Carr, they also factor into our decision under K.S.A. 2013 Supp. 21-6619(b). See *Deck v. Missouri*, 544 U.S. 622, 624, 635, 125 S. Ct. 2007, 161 L. Ed 2d 953 (2005), *abrogated on other grounds by Fry v. Pliler*, 551 U.S. 112, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007) (Constitution forbids use of visible shackles during penalty phase of capital prosecution, unless justified by essential state interest specific to defendant on trial; shackling inherently prejudicial; negative effects cannot be shown from transcript; when court, without adequate justification orders defendant to wear shackles that will be seen by jury, defendant need not demonstrate actual prejudice to make out due process violation; State must prove beyond reasonable doubt error did not contribute to death verdict); see also *United State v. Jarvis*, 792 F.2d 767, 769-70 (9th Cir. 1986) (jurors' observation of shackled codefendants in courthouse elevator likely to be prejudicial to codefendant alleged to be closely affiliated with them); *Reynolds v. Gomez*, No. 97-16126, 1998 WL 869908, at *1 (9th Cir. 1998) (unpublished opinion) (defendant prejudiced by codefendant's unconstitutional shackling; recognizing danger of guilt by association when

prosecution's evidence of codefendants' guilt "inexorably intertwined").

Ultimately, we agree with the defendants that Judge Clark's failure to sever the penalty phase of their trial was error requiring vacation of their remaining death sentences and remand to district court.

Both defendants renewed all motions, which included their motions to sever, in the penalty phase of the prosecution. Judge Clark denied the motions.

In general, during the penalty phase, J. Carr continued the pattern he had set in the guilt phase by emphasizing that R. Carr was the more culpable actor and a negative influence in J. Carr's life.

The Eighth Amendment to the United States Constitution requires the jury to make an individualized sentencing determination. It does not categorically mandate separate penalty phase proceedings for each codefendant in a death penalty case. *United States v. Tipton*, 90 F.3d 861, 892 (4th Cir. 1996) (joint trials in death-eligible cases are not per se unconstitutional); *United States v. Rivera*, 363 F. Supp. 2d 814, 823 (E.D. Va. 2005) ("The defendants [in a capital case] have an Eighth Amendment right to an 'individualized determination' of their penalty phase sentence, however, this important right does not compel an individual penalty phase hearing.").

R. Carr is partially correct when he argues that J. Carr's mitigation evidence qualified as antagonistic to his mitigation case. See *State v. White*, 275 Kan. 580, 590, 67 P.3d 138 (2003) (citing *State v. Myrick & Nelms*, 228 Kan. 406, 416, 616 P.2d 1066 [1980]).

To the extent mitigation evidence on behalf of J. Carr merely proved R. Carr's criminal history and engagement in a deviant lifestyle that continued at the time of the Birchwood crimes, it was not in conflict with R. Carr's penalty phase case. The jury had already heard R. Carr's counsel and Donley talk about R. Carr's drug sales during the guilt phase. Then, in the penalty phase, jurors heard more on these subjects from witnesses called by R. Carr. Lyons and Cossman testified about his convictions on various offenses. Woltersdorf testified about R. Carr's diagnosis of anti-social personality disorder, for which there is no successful treatment protocol, and he had no disagreement with clinical profiles characterizing R. Carr as a "self-centered and poorly socialized" individual, "primarily concerned with instant gratification of his immediate wants and needs." Reidy testified about R. Carr's early affiliation with a gang, his gang-related fights, his drug-related conflicts, his illegal narcotics use, and his prior arrests.

However, to the extent mitigation evidence on behalf of J. Carr was used by him to differentiate between his and R. Carr's levels of moral, not legal, culpability for the killings of Heather M., Aaron S., Brad H., and Jason B., the penalty phase cases of R. Carr and J. Carr were antagonistic.

Cases in which we have rejected a claim of antagonism attributed to similar fingerpointing between codefendants over which was the likely principal and which the likely aider and abettor when neither was exposed to the death penalty—see *State v. Boyd*, 281 Kan. 70, 82, 127 P.3d 998 (2006); *White*, 275 Kan. at 590-91 (citing *Myrick*, 228 Kan. at 416-17;

State v. Sully, 219 Kan. 222, 225, 547 P.2d 344 [1976])—are not controlling. In fact, they are not even minimally persuasive.

To begin with, we state the obvious: Until a 2013 amendment of the "Hard 50" statute in response to *Alleyne v. United States*, 570 U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), noncapital cases have not required penalty phase trials to juries at all. Compare K.S.A. 21-4635 with K.S.A. 2013 Supp. 21-6620(b)(2) (requiring separate sentencing proceeding before jury to determine applicability of "Hard 50" sentence).

More important and, perhaps, less obvious: Fingerpointing focused on which of two codefendants was the principal and which the aider and abettor has absolutely no bearing on whether a factfinder should find either guilty or not guilty of the crime. A principal and an aider and abettor are equally culpable *under the law*. See K.S.A. 2013 Supp. 21-5210 (aider and abettor criminally responsible for crime committed by principal); *State v. Soto*, 299 Kan. 102, Syl. ¶ 2, 322 P.3d 334 (2014) ("The Kansas aiding and abetting statute does not add distinct material elements to the definition of a charged crime, thus creating alternative means of committing that crime. Rather, the aiding and abetting statute simply extends criminal responsibility to a person other than the principal actor.").

Whether a defendant is legally guilty or not guilty under the law is no longer at issue in the penalty phase of a capital case. But differentiation in the *moral* culpability of two defendants can have determinative bearing in a joint trial on whether a juror decides to show mercy to one while refusing to show mercy to the

other. *State v. Kleypas*, 272 Kan. 894, 1103, 40 P.3d 139 (2001) (mitigating circumstances allow juror to consider factors that "may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense"; improper for prosecutor to argue certain circumstances should not be considered as mitigating circumstances because they do not excuse or justify crime). And mercy from a single juror is all it takes to send a capital defendant to prison rather than to execution. See *State v. Cheever*, 295 Kan. 229, 267-68, 284 P.3d 1007 (2012), *cert. granted in part* 133 S. Ct. 1460 (2013), *vacated and remanded*, 134 S. Ct. 596 (2013) (approving instruction on "exercise of mercy" as proper mitigator). Mercy may overcome even the most obvious imbalance between forceful evidence of aggravators from the State and a defense mitigation case that is so weak it would not pull the skin off a rice pudding.

Our conclusion that the defendants' penalty phase cases were at least partially antagonistic to each other is cemented by J. Carr's cross-examination of Temica, the defendants' sister. That cross-examination elicited Temica's testimony that, during a visit she made to R. Carr in jail, he admitted to shooting the Birchwood victims. Furthermore, we are not satisfied that this testimony inevitably would have been admitted in a severed penalty phase.

Although one may speculate that the State's routine questioning of defense witnesses who had visited R. Carr in jail about the conversations they had there would have prompted Temica to give the same testimony in a separate proceeding, one cannot do

better than speculate on this point. On the record before us, it is at least as possible that the State was completely unaware of R. Carr's admission to Temica until J. Carr's counsel exposed it in the middle of R. Carr's mitigation case. The State did not put Temica on the witness stand during its penalty case. It merely followed up during her cross-examination. Once a skilled lawyer is told what to look for, there is a far greater likelihood that he or she will find it and exploit it. And Temica's testimony about R. Carr's admission did not soften so much during her examination by the State—"I believe I heard him tell me something like that. I don't remember like when he asked me who he shot and all that, I don't remember who was, you know, shot by who[m]"—that its probable influence on the jury was neutralized. We have often observed that a confession is the most persuasive evidence in the State's arsenal. See *State v. Yurk*, 230 Kan. 516, 519, 638 P.2d 921 (1982) (confession "one of the strongest forms of physical evidence available to the prosecution"); *State v. Watkins*, 219 Kan. 81, 90-91, 547 P.2d 810 (1976) (same). If any juror was inclined to show mercy to R. Carr because of residual doubt, as R. Carr argues, or because of a belief that J. Carr was the one who fired the black Lorcin in the soccer field, that juror was much less inclined to do so after Temica's testimony was introduced by J. Carr's counsel.

Such a change in perspective would not have been ameliorated by one of the prosecutor's three later references during questioning to J. Carr's jailhouse boasts about being the triggerman —*e.g.*, that he had "lined [the Birchwood victims] up in a ditch and went pop, pop, pop, in the back of the head." As

mentioned, the State never put on evidence to support the prosecutor's references, and Judge Clark ultimately directed the jury to disregard them. In addition, we note that one of the statements attributed to J. Carr by the prosecutor directly implicated R. Carr, not J. Carr, by describing R. Carr's motivation to rape one of the victims in particularly disgusting and demeaning language.

In addition to focusing on antagonism and the possibility that some of the evidence introduced by J. Carr was unlikely to come into evidence during a severed penalty phase, R. Carr argues that J. Carr's mitigation was prone to being used as improper, nonstatutory aggravating evidence against him.

Again, we are compelled to agree.

Although Judge Clark correctly instructed the jury that each defendant was entitled to have his sentence decided on the evidence and law applicable to him, and that "[a]ny evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant," this is a rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic. In view of the defendants' joint upbringing in the maelstrom that was their family and their influence on and interactions with one another, including testimony that tended to show that R. Carr was a corrupting influence on J. Carr, the penalty phase evidence simply was not amenable to orderly separation and analysis. See *United States v. Aquart*, 3:06CR160, 2010 WL 3211074, at *7 (D. Conn. 2010) (unpublished opinion) (ordering separate, sequential penalty phase proceedings when jury might view codefendant brother's lesser culpability

as reason for concluding defendant more deserving of death penalty; defendants' plan to call family members to testify about upbringing, character created risk jury could conclude positive traits of one brother missing from other); see also *United States v. Catalan-Roman*, 376 F Supp. 2d 96, 106 (D.P.R. 2005) (sequential penalty phase proceedings warranted when one defendant's evidence would show jury how codefendant more culpable); *United States v. Green*, 324 F. Supp. 2d 311, 325-26 (D. Mass. 2004) (penalty phase severed when government asserts same aggravating circumstance against defendants; defendants likely to argue mitigation by shifting blame to other; by arguing not as worthy of death as codefendant); *cf. Espinosa v. State*, 589 So. 2d 887, 894-95 (Fla. 1991), *cert. granted, judgment rev'd* 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) (J. Barkett, dissenting) (when defendants presenting antagonistic defenses, severance should always be rule in penalty phase of capital case).

This inevitable effect was compounded by the fact that the aggravators against which the evidence must be compared were precisely the same for both defendants. And similarly, the court's instructions identified the same statutory mitigating circumstances for both R. Carr and J. Carr.

In short, Judge Clark's refusal to sever the defendants' penalty phase was error that violated both R. Carr's and J. Carr's Eighth Amendment right to an individualized capital sentencing determination. Can this error be considered harmless? *Satterwhite v. Texas*, 486 U.S. 249, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988); *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990). We have identified the

appropriate harmless error standard when considering the penalty phase of a capital trial.

> "[T]he standard of review and the ultimate question that must be answered with regard to whether [error] in the penalty phase of a capital trial was harmless is whether the court is able to find beyond a reasonable doubt that the [error], viewed in the light of the record as a whole, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances." *Kleypas*, 272 Kan. at 1087-88.

The test is not whether a death penalty sentence would have been imposed but for the error; instead the inquiry is whether the death verdict actually rendered in this trial was surely unattributable to the error. *Kleypas*, 272 Kan. at 1087-88.

We conclude that R. Carr's Eighth Amendment right to an individualized sentencing determination was fatally impaired by this failure to sever. The evidence that was admitted, the especially damning subset of it that may not have been admitted in a severed proceeding, and the hopelessly tangled interrelationship of the mitigation cases presented by the defendants persuades us that the jury could not have discharged its duty to consider only the evidence limited to one defendant as it arrived at their death sentences. We cannot say that the death verdict was unattributable, at least in part, to this error.

We therefore order vacation of R. Carr's remaining death sentence and remand to the district court. If a new penalty phase is conducted, it must be severed

from any for J. Carr and must be tried before a jury that does not also hear J. Carr's penalty phase.

P2. NOTICE OF AGGRAVATING FACTORS

R. Carr moved to bar his penalty phase on the ground that the State failed to give him constitutionally sufficient notice of the aggravating factors it intended to rely upon to seek death, despite its compliance with K.S.A. 21-4624(a).

Our review of this question of law is unlimited. See *Gaudina v. State*, 278 Kan. 103, 104, 92 P.3d 574 (2004); *State v. Ivory*, 273 Kan. 44, 46, 41 P.3d 781 (2002).

R. Carr relies on *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999); and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). We have already disposed of this argument unfavorably to his position. See *State v. Scott*, 286 Kan. 54, 101-02, 183 P.3d 801 (2008). R. Carr has not brought any new considerations to our attention that would merit a change of course on this issue.

P3. CHANNELING OF JURY'S DISCRETION

J. Carr has argued in his separate appeal that the four aggravating factors the State relied upon to pursue the death penalty against him were inadequate to channel the jury's discretion. We notice this unassigned error in R. Carr's appeal under K.S.A. 2013 Supp. 21-6619(b).

The State alleged the existence of four specific aggravators: that the defendants knowingly or purposely killed or created a great risk of death to more than one person; that they committed the crime for themselves or for another for the purpose of receiving money or any other thing of monetary value; that they committed the crime in order to avoid or prevent a lawful arrest or prosecution; and that they committed the crime in an especially heinous, atrocious, or cruel manner. See K.S.A. 2013 Supp. 21-6624(b) (multiple murder), (c) (monetary gain), (e) (avoidance of arrest, prosecution), and (f) (especially heinous, atrocious, cruel).

We have rejected the defense arguments advanced here on each of the four aggravators, when those arguments were made on behalf of other death penalty defendants. See *State v. Scott*, 286 Kan. at 108-10 (rejecting argument on multiple murder, monetary gain); *State v. Kleypas*, 272 Kan. at 1025, 1029 (rejecting argument on avoidance of arrest; especially heinous, atrocious, cruel). The defense has not given us cause to revisit these holdings in this case.

P4. UNAVAILABILITY OF TRANSCRIPT OF JURY VIEW

R. Carr argues that the judge's failure to have a court reporter present at the jury view during the guilt phase of his trial deprived him of an opportunity to make a record sufficient for meaningful appellate review of his death sentence, violating the Eighth and Fourteenth Amendments.

"[D]ue process requires a reasonably accurate and complete record of the trial proceeding in order to allow meaningful and effective appellate review." *State v.*

Holt, 298 Kan. 531, 537, 314 P.3d 870 (2013) (citing *Entsminger v. Iowa*, 386 U. S. 748, 752, 87 S. Ct. 1402, 18 L. Ed. 2d 501 [1967]; see *Kheireddine v. Gonzales*, 427 F.3d 80, 84 [1st Cir. 2005]). And, when a claim appears to have a substantial foundation based on the available record but the claim cannot be reviewed because of the incomplete or inaccurate transcript, the proper remedy is reversal. *Holt*, 298 Kan. at 538 (citing *United States v. Wilson*, 16 F.3d 1027, 1031 [9th Cir. 1994]).

Still,

> "[a] defendant does not have a constitutionally protected right to a totally accurate transcript of the criminal proceedings. See, *e.g.*, *Tedford v. Hepting*, 990 F.2d 745, 747 (3d Cir.), *cert. denied* 510 U.S. 920, 114 S. Ct. 317, 126 L. Ed. 2d 264 (1993); *Robinson v. Smyth*, 258 Fed. Appx. 469, 471 (3d Cir. 2007) (unpublished opinion). A record that is incomplete but that involves no substantial or significant omissions does not require reversal. See, *e.g.*, *United States v. Cashwell*, 950 F.2d 699, 703 (11th Cir. 1992); *United States v. Selva*, 559 F.2d 1303, 1306 n.5 (5th Cir. 1977). Appellants seeking reversal on the grounds that they are denied due process because of an inaccurate or incomplete transcript must make the best feasible showing possible that a complete and accurate transcript might have changed the outcome of the appeal. *Ortiz-Salas v. I.N.S.*, 992 F.2d 105, 106 (7th Cir. 1993); see *Al-Ghorbani v. Holder*, 585 F.3d 980, 992 (6th Cir. 2009)." *Holt*, 298 Kan. at 538.

See *State v. Stafford*, 223 Kan. 62, 64, 573 P.2d 970 (1977) (inability of State to provide transcript does not entitle defendant to new trial per se); *State v. Jefferson*, 204 Kan. 50, 51-52, 460 P.2d 610 (1969) (same; defendant must make good faith effort to obtain secondary statement of transcript).

As discussed fully in Section 23 of this opinion, R. Carr's substantive jury view arguments do not lead to relief. There is no claim of misconduct by anyone during the view and no other claim with a substantial foundation that requires us to know more than we know now about the view or anything that occurred during it. We are aware of no effort to construct a substitute for a transcript of the view. See Supreme Court Rule 3.04(a) (2013 Kan. Ct. R. Annot. 23) (procedure to be followed when transcript unavailable).

Under these circumstances, we cannot conclude that any constitutional violation has occurred because of the absence of a transcript of the jury view. R. Carr has been provided a reasonably accurate and complete record of the proceedings against him. That is what he is entitled to under the United States Constitution.

P5. K.S.A. 21-4624(c)

R. Carr challenges the allowance of hearsay under K.S.A. 21-4624(c) during his penalty phase trial. He argues that this statute violates the heightened reliability standard applicable to capital cases. See *State v. Scott*, 286 Kan. at 76 (references to "heightened scrutiny" applied in capital case); *State v. Marsh*, 278 Kan. 520, 525, 102 P.3d 445 (2004), *rev'd and remanded* 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006), *vacated in part* 282 Kan. 38, 144 P.3d 48

(2006) ("We begin by observing that there is a heightened scrutiny of trial proceedings in a capital case.") (citing *Beck v. Alabama*, 447 U.S. 625, 637-38, 100 S. Ct 2382, 65 L. Ed. 2d 392 [1980]). He also argues that his constitutional rights were violated by the introduction of hearsay evidence under the authority of this statute during the penalty phase of his trial.

We briefly address these arguments to provide guidance on remand. R. Carr's pretrial motion to challenge the constitutionality of the statute was rejected by Judge Clark.

The Statute and the Standard of Review

K.S.A. 21-4624(c) provides for a relaxed evidentiary standard during the penalty phase of a capital proceeding:

> "In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in

> violation of the constitution of the United States or of the state of Kansas shall be admissible."

"When the application of a statute is challenged on constitutional grounds, this court exercises an unlimited, de novo standard of review." *State v. Cook*, 286 Kan. 766, 768, 187 P.3d 1283 (2008) (citing *State v. Myers*, 260 Kan. 669, 676, 923 P.2d 1024 [1996], *cert. denied* 521 U.S. 1118 [1997]).

> ""The constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and before the act may be stricken down it must clearly appear that the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond reasonable doubt. [Citations omitted.]"" *State v. Brown*, 280 Kan. 898, 899, 127 P.3d 257 (2006).

Heightened Standard of Reliability

R. Carr recognizes that his argument based on the existence of a heightened standard of reliability in capital cases was rejected in *Scott*. That holding stands.

In *Scott*, we addressed defendant Gavin Scott's due process challenge to the constitutionality of K.S.A. 21-4624(c). 286 Kan. at 99. We rejected it, based on federal cases holding a similar federal provision constitutional. See 286 Kan. at 100 (citing, *e.g.*, *United States v. Fell*, 360 F.3d 135 [2d Cir. 2004]). The Kansas

statute's relaxed standard of admission was consistent, we said, with the United States Supreme Court's "'all relevant evidence'" doctrine, which demands "'that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.'" *Scott*, 286 Kan. at 100 (quoting *Jurek v. Texas*, 428 U.S. 262, 276, 96 S. Ct. 2950, 49 L. Ed. 2d 929 [1976]).

K.S.A. 21-4624(c), we explained,

> "provides for an individualized inquiry, and does not limit the discretion of the sentencer to consider relevant circumstances offered by the defendant. K.S.A. 21-4624(c) provides that only relevant evidence is to be admitted, thus assuring the evidence actually has probative value. Moreover, evidence secured in violation of the United States Constitution or the Kansas Constitution is inadmissible. Consequently, we conclude the relaxed evidentiary standard is sufficient to protect the defendant's right to a fair trial and does not violate either the United States or Kansas Constitutions." *Scott*, 286 Kan. at 100-01.

In the words of the *Fell* opinion upon which we relied in *Scott*: "[T]he Supreme Court has made clear that in order to achieve 'heightened reliability,' *more* evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors [A relaxed evidentiary standard] does not undermine 'heightened reliability'[;] it promotes it." *Fell*, 360 F.3d at 143-44.

R. Carr argues that the statute's relaxed evidentiary standard should apply only to a capital defendant's mitigating evidence. But his argument is rejected by the authority he cites to support it. See *Gregg v. Georgia*, 428 U.S. 153, 203-04, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (best practice "not to impose restrictions" on State's evidence offered at presentence hearing, as long as defendant not prejudiced).

Although R. Carr accurately observes that K.S.A. 21-4624(c) lacks any balancing test to weigh the probative value of information against any prejudice the defendant may suffer from its admission, a district judge nevertheless continues to fill an inherent role as "gatekeeper of constitutionally permissible evidence." *Fell*, 360 F.3d at 145 ("[I]t remains for the court, in the exercise of its judgment and discretion, to ensure that unconstitutional evidence otherwise admissible under applicable evidentiary rules is excluded from trial.").

Confrontation Clause

On the Confrontation Clause, R. Carr argues that K.S.A. 21-4624(c) allows introduction of testimonial hearsay in violation of *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In fact, it cannot do so if the federal Constitution forbids it. *Cf. United States v. Cheever*, 423 F. Supp. 2d 1181, 1194 (D. Kan. 2006) (federal Constitution superior to federal rule of evidence).

The United States Supreme Court handed down its opinion in *Crawford* well after the trial of this case in 2002. See 541 U.S. 36. *Crawford* held that the Sixth Amendment bars "'admission of testimonial statements of a witness who did not appear at trial unless he was

unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting *Crawford*, 541 U.S. at 53-54).

Thus the first question before us is whether *Crawford*'s interpretation and application of the Confrontation Clause reaches the penalty phase of a capital proceeding. The United States Supreme Court has not yet answered this question. *United States v. Umaña*, 750 F.3d 320, 360 (4th Cir. 2014) (Gregory, J., dissenting). Until we have a definitive answer from that Court, we recognize that other jurisdictions are split and we accept convincing arguments that confrontation law is applicable to a capital penalty phase trial. Compare *United States v. Fields*, 483 F.3d 313, 324-338 (5th Cir. 2007) (Sixth Amendment confrontation rights do not apply); *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (same); *Muhammad v. Secretary, Florida Dept. of Corrections*, 733 F.3d 1065, 1077 (11th Cir. 2013) (same), *cert. denied* 134 S. Ct. 893 (2014); *Petric v. State*, No. CR-09-0386, 2013 WL 598118 (Ala. Crim. App. 2013) (same); *State v. Shackelford*, 155 Idaho 454, 314 P.3d 136, 142-44, *reh. denied* (2013) (same); *People v. Banks*, 237 Ill. 2d 154, 203, 934 N.E.2d 435 (2010) (same); *State v. Berget*, 2013 S.D. 1, 826 N.W.2d 1, 21, *reh. denied* (2013) (same), with *Vankirk v. State*, 2011 Ark. 428, 385 S.W.3d 144 (2011) (Sixth Amendment confrontation rights apply); *State v. Rodriguez*, 754 N.W.2d 672, 681 (Minn. 2008) (same); *State v. Hurt*, 208 N.C. App. 1, 19, 702 S.E.2d 82 (2010) (same) (2012) *rev'd*, 743 S.E.2d 173 (N.C. 2013); see Note, *The Confrontation Clause at Capital Sentencing: Should Prison Incident Reports Be*

Admissible in South Carolina, 3 Charleston L. Rev. 739, 742-48 (2009) (detailing split of cases before publication of article in 2009).

Assuming application of Sixth Amendment confrontation rights in the penalty phase of a capital proceeding, R. Carr is right to question whether the State's mention of witness statements recorded in police reports during cross-examination of several defense witnesses should have been permitted. Out-of-court statements of witnesses to investigating law enforcement officers introduced to prove the fact of the matter asserted are textbook testimonial hearsay. See *State v. Jones*, 287 Kan. 559, 565-66, 197 P.3d 815 (2008) (discussing factors to determine whether hearsay statement testimonial).

It is not a wholly satisfactory response to say that the prosecutor's questions did not qualify as admitted evidence, that the statements were used only to impeach defense witnesses, or that the statements were not offered for the truth of the matter asserted. Inclusion of the statements as an explicit basis for the prosecutor's questions obviously implies to the jury that they have a basis in fact, regardless of whether the statements qualify for the label of evidence. But nothing in the record before us demonstrates that such a basis was ever tested. Any impeachment should only be effective if a sound basis for the prosecutor's impeaching question exists. And a sound basis exists only if the statements are true.

At any repeat penalty phase hearing on remand, we caution the parties and the district judge that Kansas now holds that the Sixth Amendment applies in the proceeding and that out-of-court testimonial hearsay

may not be placed before the jury without a prior opportunity for the defendant to cross-examine the declarant. This includes any testimonial hearsay referenced in questions posed by counsel.

P6. EXCLUSION OF MITIGATING EVIDENCE

R. Carr challenges Judge Clark's exclusion of evidence of R. Carr's likelihood of parole and the impact of his execution. We provide guidance on these issues for any retrial of the penalty phase on remand.

Additional Factual and Procedural Background

R. Carr sought to admit testimony of Bill Miskell, public information officer at the Kansas Department of Corrections, about the number of prisoners serving a life sentence who had been paroled and the number who had died in prison. During Miskell's direct examination, counsel for R. Carr asked about Defendant's Exhibits A-33 and A-34. The exhibits showed that, in the previous 20 years, 847 offenders had been incarcerated in Kansas for first-degree or capital murder. Of those, 202 convicted of first-degree murder had been paroled, and 37 inmates convicted of first-degree murder had died in prison. Of those paroled, six had been returned to prison on a new felony conviction. The exhibits also showed that "the average length of time between the admission date and the first parole eligibility date [was] 16 years[] 11 months and 17 days" and that "[t]he average length of time between the first parole eligibility date and the release date [was] 11 months and 17 days."

The State objected:

> "The State believes these letters are objectionable, one, because they contain the hearsay of [R. Carr's counsel]; and two, because the content is irrelevant following the ruling of *State v. Kleypas*, [272 Kan. 894, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002), *abrogated on other grounds by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006),] unless it goes to the defendant's individual characteristics."

When asked to explain the purpose of the testimony, R. Carr's counsel stated:

> "I wanted to provide the jury with as much information as I could . . . about [the alternative sentence] Since Kansas has not had a hard 50 for long enough for a 50-year sentence to be completed, to actually determine how long a person actually serves before they see the parole board and eventually are released, averaging out. I thought we would do a brief historical analogy with the life sentence in Kansas ranging from the 15-year minimum, which was traditionally what a life sentence meant, up through the 40-year sentence, which we went to after that, to the 25 and the 50."

After hearing from all counsel, Judge Clark ruled:

> "To me the issue is, and what we'll instruct on, unless something changes between then and now, is that the jury must decide if aggravating circumstances exist. Then they must decide if those aggravating circumstances they find to

> exist under the law outweigh the mitigating circumstances. And in doing that they must look at the individual being considered in that determination. I do not find relevance in the proffered Exhibits A-33 or A-34. Objection sustained."

R. Carr also proffered the testimony of Marilyn Scafe, then chair of the Kansas Parole Board. Scafe would have explained to the jury that the Board looked at seven statutory requirements to determine whether someone serving a life sentence should be paroled. According to Scafe, those requirements

> "encompass the conditions of the crime, the severity of the crime itself, the background of the offender, taking into consideration their criminal history. It takes into consideration how they've responded since they've been incarcerated, the programs they've taken, their discipline reports they have had or haven't had. Then it also considers all of the plans they have for the future. The parole plan, where they plan to reside, what employment opportunities there are, their support and their opposition. We also have public comments which are solicited from the county of conviction, the judge, the—any of the officials, the judge, the district attorney's office, the sheriff and the police department. And the victim is notified and we take comments from the victim at that point, too."

Scafe also would have said that a prisoner would not necessarily be paroled on the date first eligible. In addition, she would have said that, up to that point, the

Board had yet to consider parole for a person sentenced to a hard 25 life sentence.

The State's relevance objection to Scafe's testimony also was sustained.

Judge Clark also excluded certain testimony R. Carr sought to admit from his sister, Temica. Counsel asked her, "[D]o you have any idea what you would like the jury to do in regard to Reggie's sentence?" and "How do you think it will affect you if Reginald Carr is executed?" The State objected to both questions on relevance, and Judge Clark sustained the objections.

The record contains no proffer of Temica's anticipated answers on the two questions to which the State successfully objected. R. Carr's brief states without citation to record support that Temica would have testified about "the value of Reginald's life to her, and the pain she would suffer should Reginald be executed."

Likelihood of Parole

As we have discussed in other sections of this opinion, relevance encompasses both materiality, reviewed de novo, and probative value, reviewed under an abuse of discretion standard. See *State v. Hilt*, 299 Kan. 176, 188-89, 322 P.3d 367 (2014). Whether the information R. Carr sought to introduce on likelihood of parole was relevant turns on whether it was probative on the material question of his likelihood of eventual parole.

In a capital sentencing proceeding, the Eighth and Fourteenth Amendments require that a capital defendant be allowed to present evidence to the jury of

mitigating factors, and the jury must be permitted to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); see *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S. Ct. 1654, 167 L. Ed. 2d 585 (2007); *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) *abrogated on other grounds Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). This requirement to allow evidence that bears on the defendant individually does not expressly prohibit broader evidence, but we have ruled that such evidence having to do with general conditions of incarceration may properly be excluded in a penalty phase of a death penalty case, unless it is designed to counter evidence from the State that prison life would be easy. *Kleypas*, 272 Kan. at 1071, 1073.

Neither Miskell's statistical information nor Scafe's testimony about the statutory rubric for granting parole and the fact that it had not yet been considered for anyone serving a hard 25 life sentence appeared to have much, if anything, to do with R. Carr individually. They would have told the jury nothing meaningful about his actual likelihood of being granted parole at some point in the distant future, and thus Judge Clark's decision to exclude this evidence was not an abuse of discretion.

Execution Impact Testimony

Other jurisdictions that have addressed the admissibility of execution impact testimony are split.

Three jurisdictions whose cases are cited by both parties do not allow such testimony. See *State v. Dickerson*, 395 S.C. 101, 122-23, 716 S.E.2d 895 (2011) (testimony that defendant's family had already lost two members to homicide; suffering would be exacerbated by defendant's death); *Ross v. State*, 954 So. 2d 968, 1012-13 (Miss. 2007) (motion in limine to prevent defendant's family from testifying about impact death sentence would have properly granted); *People v. Armstrong*, 183 Ill.2d 130, 154-55, 700 N.E.2d 960 (1998) (testimony of defendant's sister "regarding the death penalty's effect on the defendant's family" properly excluded as irrelevant).

Oregon permits admission of such testimony. See *State v. Stevens*, 319 Or. 573, 879 P.2d 162 (1994). At issue in the Oregon case was whether the defendant's wife could answer the following question: "Do you have an opinion as to whether it would be better for [your daughter] if her father lived in prison for the rest of his life without possibility of parole or died?" 319 Or. at 576. Because the anticipated testimony might be informative about the defendant's character, it was permissible. 319 Or. at 585.

We agree with the Oregon court that any admitted testimony of this nature needs to have some bearing on the material question of the defendant's character, *i.e.*, be probative on that material fact. This principle should be the lodestar for the district judge conducting any severed penalty proceeding on remand. At this stage, without a proffer of the testimony Temica would have given, see *State v. Evans*, 275 Kan. 95, 99, 62 P.3d 220 (2003) (proponent of excluded evidence has duty to make known substance of expected evidence in proffer),

we can only prescribe the proper question, not predict its correct answer.

P7. Agreement of Other Experts

R. Carr argues on appeal that the State's rebuttal expert should not have been able to testify about witness colleagues' out-of-court agreement with his opinions. We provide guidance on this issue for any retrial of the penalty phase on remand.

Additional Factual and Procedural Background

The State's rebuttal expert, Pay, was extremely critical of defense expert Preston's conclusions and the PET scan images upon which Preston had relied. Pay said that the images failed to show the brain structures Preston had claimed they did, that they used an odd color reduction, and that they had been manipulated—according to what he was told—by design. Pay also testified that the scans did not show abnormal brains and that Preston's conclusions to the contrary were wrong.

Pay also testified that the scans had been performed at Via Christi by a respected technologist, Susan Stratton, at Preston's direction and in his presence. It was clear from Pay's testimony that some of the information upon which his criticisms rested had come from Stratton. When he identified her as the technologist who had performed the scans, the prosecutor instructed Pay to point her out in the courtroom. After he did so, the prosecutor asked Dr. Pay:

"Q. And you have also been in consultation with other members and colleagues in the neurological field; is that correct?

"A. Yes.

"Q. In fact, Dr. Flynn is the head of PET scans; is that correct?

"A. Yes.

"Q. And he is in the courtroom today?

"A. Right.

"Q. Raise your hand, Dr. Flynn.
(Dr. Flynn complies)

"Q. And you also have conferred with Dr. Bart Grelinger, who is a neurologist in our community. Dr. Grelinger, please raise your hand.
(Dr. Grelinger complies).

"Q. So each of these documents was reviewed, looked at, and discussed with regard to the findings that were apparent; is that right?

"A. Yes."

After Dr. Pay testified that the images had been manipulated, the prosecutor asked him how. He replied:

"Susan Stratton will attest to this more, but they were manipulated so that the temporal zones are very markedly—well, they are markedly diminished. You don't see too much of

it and you don't see the cerebellum at all. It's very, very odd."

And, again, after testifying that the scans simply missed the brain structures Preston was targeting, he was asked:

"Q. You came to learn that that was by design?

"A. We were told."

Finally, the prosecutor sought Pay's opinions about Preston's conclusions:

"Q. In fact, if you were to look at all those pictures and you have conferred with other radiologists and other experts and is there a conclusion as to the function of Jonathan Carr's brain?

"A. You mean with his interpretation?

"Q. With this.

"[J. Carr's counsel]: Objection to other folks' opinions beside Dr. Pay's, Your Honor.

"THE COURT: I will overrule the objection.

"Q. You may answer.

"A. Could you repeat the question, please?

"Q. I guess I should, shouldn't I? When you reviewed this and as we talked about the number of individuals who called in to

look, did you reach a consensus as to this brain being normal?

"A. Yes.

"Q. Do you have any quarrel?

"A. No.

"Q. Anybody have a problem with that?

"A. No.

"Q. Now looking at Reginald Carr's, if you would, Doctor. What can you tell us about Reginald Carr's brain from the documents you have here?

"A. There's normal metabolic function of both temporal lobes.

"Q. And this again is a consensus opinion?

"A. Yes.

"Q. And you concur?

"A. Yes."

During the State's redirect, this exchange occurred:

"Q. The fact of it is that here in Court today are your colleagues that all work in that area in the different disciplines that worked with you and looked and came to a consensus on both of these tests?

"A. Yes.

"[R. Carr's counsel]: Objection, Your Honor, leading.

"THE COURT: It does suggest the answer.

"Q. Did you confer with colleagues?

"A. Yes, I did.

"Q. Did you reach a conclusion?

"A. Yes.

"Q. Did you reach a consensus?

"A. Yes.

"Q. What is that consensus?

"A. That they're both normal."

On recross-examination by R. Carr's counsel, he asked about the colleagues that were consulted:

"Q. Dr. Pay, the colleagues that you consulted with are, I assume, the people that do PET scans? Why aren't they here?

"A. He is here, one of them is here.

"Q. Why didn't he testify?

"A. He could testify for you if you wanted to. He looked at the same scans.

"Q. But you don't read PET scans but you are coming in here giving an opinion about PET scans; is that correct?

"A. Yes."

Confrontation Clause Applicability

Both R. Carr and J. Carr characterize this issue as one arising under the Sixth Amendment Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36.

We have already said in Section P5 of this opinion that the Confrontation Clause should apply in the penalty phase of capital proceedings and controls over any contrary interpretation or application of K.S.A. 21-4624(c) regarding relaxed evidentiary standards.

This means that, should the State attempt to admit Pay's testimony about the agreement of his colleagues again on remand, the controlling question will be whether the out-of-court statements of agreement by Pay's colleagues qualify as testimonial hearsay under the Sixth Amendment and *Crawford*.

P8. SURREBUTTAL TESTIMONY

R. Carr challenges Judge Clark's refusal to allow a brief continuance so that defense expert Preston could be present during State rebuttal expert Pay's testimony and then testify in surrebuttal.

Additional Factual and Procedural History

Pay was contacted by the State the day before he was called to the witness stand to testify in rebuttal about Preston's PET scan evidence. Neither Pay nor the State had provided the defense with an expert report or any summary of Pay's anticipated testimony.

The defense initially sought a continuance so that Preston could return to the courtroom before Pay's testimony began. Judge Clark was unwilling to grant such a continuance. He commented:

> "If Dr. Preston is coming to say what he did was right, he has already said that. And he has explained why he did the color and he explained why he made the cut Sounds like experts disagreeing. If that is what it is Dr. Preston has to say, I don't think it is surrebuttal. I think it's evidence presented in direct, not rebutted."

Although additional discussion followed, Judge Clark remained unwilling to grant a continuance. His decision was based on the idea that Preston could properly testify in surrebuttal only if he said something new. If, instead, the defense intended to have him explain to the jury what he did, why he did it, and why what he did was not deceitful or deceptive, the testimony would not be proper surrebuttal.

Judge Clark did allow time for defense counsel to interview Pay before cross-examining him before the jury. He also told counsel: "Then what I will let you do is use my telephone and call Dr. Preston. Ask him what he would say to these questions and I will revisit whether or not to wait until that time. We won't shut everything down until I make that final decision."

Although the record is not crystal clear on the amount of time the defense needed to bring Preston back to court, we see that Pay testified on the morning of November 13, more than 2 months after the trial started with jury selection on September 9. As late as "lunchtime"—the precise time is not in the record, but court recessed for lunch after hearing the parties on this matter —counsel for the defense told Judge Clark that Preston could be back to testify in surrebuttal by 3:30 p.m.

Ultimately, Judge Clark denied the defense request to have Preston return and testify.

During closing argument, the State referred to Preston's support for the defendants' abnormal mental processes as a "house of cards" that came crashing down under the weight of Pay's testimony; the prosecutor repeatedly emphasized a theme in which Preston's testimony was nothing more than "hocus pocus."

Denial of Continuance and Surrebuttal

The use and extent of rebuttal and surrebuttal rests in the sound discretion of the district judge, and his or her ruling will not be reversed unless the discretion has been abused to a party's prejudice. *State v. Martin*, 237 Kan. 285, 291-92, 699 P.2d 486 (1985). In addition, we review denial of a continuance for abuse of discretion. See *State v. Haney*, 299 Kan. 256, ___, 323 P.3d 164 (2014); *State v. Cook*, 281 Kan. 961, 986, 135 P.3d 1147 (2006).

As we have said in other sections of this opinion, discretion is abused if its exercise has relied on an incorrect legal standard. See *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011) (citing *Gonzalez*, 290 Kan. 747, 755-56, 234 P.3d 1 (2010).

The rules regarding rebuttal evidence were set out in *State v Martin*:

> "'Rebuttal evidence is that which contradicts evidence introduced by an opposing party. It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact

> which an opposing party has attempted to prove. It may be used to explain, repel, counteract or disprove testimony or facts introduced by or on behalf of the adverse party. Such evidence includes not only testimony which contradicts the witnesses on the opposite side, but also corroborates previous testimony.'" 237 Kan. at 291-92 (quoting *State v. Weigel*, 228 Kan. 194, Syl. ¶ 9, 612 P.2d 636 [1980]).

In this case, Judge Clark insisted that the defense must produce something new through any surrebuttal testimony from Preston. The State continues to hew to this standard in its briefs to this court. But there is no inflexible legal requirement that rebuttal or surrebuttal evidence be new. It may be evidence that is used to explain or counteract or simply corroborate previous testimony. Judge Clark abused his discretion on the allowance of surrebuttal and the continuance to facilitate it by exercising his discretion on the basis of a legal error. See *Ward*, 292 Kan. at 550 (citing *Gonzalez*, 290 Kan. at 755-56.

Moreover, even if newness had been a valid legal requirement, Preston should have been permitted to retake the stand to defend his methods against suggestions by Pay and the State that he had deliberately misled the jury. It is hard to imagine a situation in which the allowance of surrebuttal would be more sensible and its denial more arbitrary. Judge Clark also abused his discretion because no reasonable person presiding over a death penalty case that had been in court for more than 2 months would have agreed with his decision to disallow surrebuttal requiring a delay of, at most, a couple of hours. See

Ward, 292 Kan. at 550 (citing *Gonzalez*, 290 Kan. at 755-56). We need not discuss harmlessness because of the prior necessity of remand.

P9. SENTENCING ON NONCAPITAL CONVICTIONS

R. Carr argues that sentencing on his noncapital convictions should have preceded the penalty phase on his capital convictions and that the jury should have been informed of the exact sentence he would serve if he were not sentenced to death.

The first argument is likely to be moot, because, on remand, R. Carr's sentencing on his remaining noncapital convictions will already have occurred. The terms handed down on those convictions have not been appealed.

We briefly discuss the second question on whether a capital sentencing jury must be told the exact sentence a defendant will serve if not sentenced to death, because we wish to provide guidance to the district judge on remand.

The defendants filed an unsuccessful joint pretrial motion to have Judge Clark determine and then inform the jury of the exact duration of their sentences, should the jury not return the death penalty. At the instructions conference, J. Carr's counsel renewed the argument, asserting that the jury should be informed "with as much exactitude as possible" of the sentence his client could expect to receive if not sentenced to death. R. Carr's counsel joined in that argument.

Judge Clark instead included the following in his penalty phase instructions to the jury:

> "Should the responsibility to fix a proper sentence in all counts—to include the first four (Capital Murder) fall to me, you are instructed that the total sentence would be such that the individual defendant would not be eligible to appear before The Parole Board for a certain period of time. The period would be a minimum of 50 years and a maximum of 268 years. It is for the court to decide."

R. Carr argues that the exact length of his sentences if no death penalty were imposed had to be shared with the jury under the Eighth and Fourteenth Amendments and Section 9 of the Kansas Constitution Bill of Rights, because the length of the sentences qualified as mitigating. Under Kansas law, the list of statutory mitigating facts includes the following: "A term of imprisonment is sufficient to defend and protect the people's safety from the defendant." K.S.A. 21-4626(9).

The defense relies on the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994), and on our decision in *Kleypas*, 272 Kan. 894, 1080, 40 P.3d 139 (2001).

In *Simmons*, the Court specifically addressed whether a capital defendant's due process rights required his sentencing jury to be informed that he would be ineligible for parole, when the State had used the defendant's future dangerousness as an aggravating circumstance. According to the plurality decision, the prosecution had argued that "a verdict for death would be 'a response of society to someone who is a threat. Your verdict w[ould] be an act of

self-defense.'" *Simmons*, 512 U.S. at 157. The defense had asked the trial judge to clarify for the jury that "life imprisonment" would mean no possibility of parole, but the judge refused. Then, during deliberations, the jury sent out a question on exactly that topic: "Does the imposition of a life sentence carry with it the possibility of parole?" 512 U.S. at 160. The judge responded:

> "'You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning.'" 512 U.S. at 160.

The plurality held that the defense was entitled to inform the jury of the defendant's parole ineligibility. 512 U.S. at 171. "The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'" 512 U.S. at 161.

> "In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing

> determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause." 512 U.S. at 163-64.

In a concurring opinion, Justice Sandra Day O'Connor noted that "[i]n a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact," and that "[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the States." 512 U.S. at 176 (O'Connor, J., concurring) (citing *California v. Ramos*, 463 U.S. 992, 1013-14, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 [1983]).

In this case, the judge's decision not to inform the jury of R. Carr's exact sentences in the event of no capital sentences did not deprive him of the opportunity to argue that a term of imprisonment was sufficient to protect the public, *i.e.*, was mitigating. In fact, R. Carr's counsel argued exactly that point during closing:

> "Reggie is going to be incarcerated. He will be put in prison basically forever. He is going to be caged up. And Reggie needs to be caged up with the lions in the penitentiary, so all of us rabbits will be safe. That's not going to be a problem with us . By the time he is first eligible to see the parole board, if he gets the minimum sentence he can possibly get, his oldest son will be older than Val Wachtel over there. That's how long he is going to be in the penitentiary. He is actually going to be in there forever. He is never

> going to be able to walk out and get in his car and drive off."

The situation here was completely different from that before the *Simmons* Court. In *Simmons*, the jury was prevented from considering the clearly mitigating fact that the defendant would never be paroled. R. Carr's jury was not only told his shortest possible sentence, 50 years, a length likely to be mitigating in and of itself, but the possibility that he would face more than five times that long in prison, 268 years or more. Jurors also heard his counsel draw the sensible conclusion that his client would never leave prison alive. On this record, we conclude that *Simmons* did not demand more than R. Carr received in Judge Clark's jury instruction.

Our own decision in *Kleypas*, 272 Kan. at 1080, gives us a bit more pause.

In that case, we ruled that defense counsel's refusal of the district judge's offer to instruct on the possibility of a life sentence with initial parole eligibility at either 25 or 40 years meant that any error based on the absence of that instruction was invited. 272 Kan. at 1080. We also ruled that the district judge's failure to instruct *sua sponte* on the sentences the defendant would receive for his other felony convictions was not error. 272 Kan. at 1080-81. We rejected the notion that the Eighth Amendment required a system "in which the court is required to instruct on the potential sentences a defendant will receive for convictions arising from the same trial as the capital-murder conviction." 272 Kan. at 1081.

Still, we set a somewhat higher bar for a district judge to meet on instructions about a capital defendant's potential term of imprisonment in future cases:

> "In the absence of a request, the trial court has no duty to inform the jury in a capital murder case of the term of imprisonment to which a defendant would be sentenced if death were not imposed. Where such an instruction is requested, the trial court must provide the jury with the alternative number of years that a defendant would be required to serve in prison if not sentenced to death. Additionally, where a defendant has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the possible terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be served consecutively or concurrently to each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court." 272 Kan. at 1081-82.

Kleypas was decided in 2001. The trial in this case was held in 2002. The only portions of the express language of the *Kleypas* future directive from which Judge Clark deviated were its requirement that the jury instruction contain information on possible terms of imprisonment "for each additional charge" and a statement that the judge would be responsible for deciding whether sentences were consecutive or concurrent with each other. Apparently Judge Clark

did rely on the possible terms of imprisonment for each additional charge and concurrent or consecutive status when he gave the jury the combined range of initial parole eligibility from 50 to 268 years.

We would not regard either omission or the omissions together as particularly serious. Judge Clark's instruction did not pose a reasonable likelihood that the jury failed to consider constitutionally relevant evidence in mitigation. However, because it is possible on remand for any district judge presiding over a new, severed penalty phase to give precise information on the unappealed sentences already handed down on R. Carr's noncapital convictions, as well as the sentence he will be subject to on his remaining capital conviction if he does not receive the death penalty, it seems wise to do so. We see no reason to keep that information, if available, from the jury, unless the defense objects. The provision of adequate societal protection through service of a specific long prison sentence is a statutory mitigator under Kansas law, and the judge should enable the ability of R. Carr's counsel to fully argue its application.

P10. BURDEN OF PROOF ON MITIGATING FACTORS

R. Carr has argued that the instructions in his penalty phase were fatally flawed because they failed to tell the jury that mitigating factors need not be proved beyond a reasonable doubt. Because this issue may arise again on remand, we provide the following brief guidance to the district judge.

The State acknowledges that the trial court did not expressly instruct the jury on the burden of proof for mitigating circumstances. The aggravating

circumstances instruction and the verdict forms informed the jury specifically that the State was required to prove aggravating circumstances beyond a reasonable doubt.

In Kansas, a district judge must instruct a penalty phase jury in a capital case not only that it need not be unanimous on the existence of a mitigating circumstance but also that a mitigating circumstance need not be proved beyond a reasonable doubt. See *State v. Gleason*, No. 97,296, 299 Kan. ___, ___ P.3d ___ (filed July 18, 2014) (slip op. at 82-86) (discussing *Scott*, 286 Kan. at 106-07; *Kleypas*, 272 Kan. at 1078); see also K.S.A. 21-4624 (State expressly burdened with proving existence of aggravating circumstance beyond reasonable doubt; statute silent on standard of proof on mitigating circumstance). When nothing in the instructions mentions any burden other than "beyond a reasonable doubt," jurors may be "prevented from giving meaningful effect or a reasoned moral response to" mitigating evidence, implicating a defendant's right to individualized sentencing under the Eighth Amendment. *Gleason*, 299 Kan. at ___ (slip op. at 85) (citing *Scott*, 286 Kan. at 107). This is unacceptable.

Were we not already vacating R. Carr's death sentence on Count 2 and remanding the case because of Judge Clark's failure to sever the penalty phase, error on this issue would have forced us to do so. See *Gleason*, 299 Kan. at ___ (slip op. at 85). In any new penalty phase on remand, the district judge must ensure that jurors understand that mitigating circumstances need not be proved beyond a reasonable doubt.

P11. "THE CRIME" IN AGGRAVATING CIRCUMSTANCES INSTRUCTION

R. Carr argues that a reference to "the crime" in the instruction on his aggravating circumstances was too vague and may have led the jury to rely on his conviction of a crime other than capital murder to find the existence of an aggravating circumstance. We address the merits of this issue to provide guidance on remand.

Additional Factual and Procedural Background

In Instruction No. 5, Judge Clark identified the aggravating circumstances in issue for R. Carr. The parts of this instruction pertinent to this issue said that the State sought to prove R. Carr committed "the crime" for monetary gain; to evade arrest; and in a heinous, atrocious, or cruel manner.

After the close of evidence in the penalty phase, Judge Clark made a few introductory comments before instructing the jury. Among other things, he explained:

> "As you know, our focus here is on the first four counts, those are the capital murder counts.
>
> "It is the responsibility of the jury to decide the proper sentence for the individual defendants in those four counts It is my responsibility to decide on the proper sentence for the individual defendant on all other counts in which you returned a verdict of guilty."

The opening penalty phase instruction also emphasized that the jury sentencing responsibility

arose out of its earlier guilty verdicts on capital murder:

> "The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence."

In Instruction No. 9, Judge Clark told the jury to mark the verdict form to coincide with its sentencing decision. He said that jurors had "been provided verdict forms which provide for three alternative verdicts in each of the four counts of Capital Murder." Each verdict form also referenced the capital murder counts and made no mention of any other offense.

During the State's closing, the prosecutor reminded the jury to consider all of the guilt phase evidence relevant to the capital murder charges:

> "If you recall at the conclusion of the case after the jury's verdict came out, what our position was, was to adopt all of those days of testimony, everything you heard in that Court, and give it to you in this phase saying that the body of the crime, that information should be and can be reconsidered in these aggravating factors, as they would apply to the capital death of Jason [B.] and Aaron [S.], Brad [H.], and Heather [M.]."

Then the prosecutor discussed the aggravating circumstances instructions, including Instruction No. 5,

explaining that aggravating circumstances were those facts and circumstances that enhanced the crime of capital murder:

> "In a legal sense, the Court explained that aggravating circumstances are those that increase the guilt or enormity of the crime or add to its injurious consequences but which are above and beyond the crime itself. And you know that *the crime of capital murder* has been found.
>
> "Now you look at the circumstances that would enhance those crimes from the perspective of a rational[], thinking jury to say these aggravators make that crime even worse. And that is what an aggravator is. So we point specifically, we point to each defendant, two defendants, two brothers, two culprits, two criminals, two individuals all found to be culpable *of capital murders* of four people." (Emphasis added.)

The State never mentioned the Schreiber and Walenta incidents in its closing, concentrating only on the reasons the capital murders and aggravating circumstances justified death verdicts.

References to "The Crime"

There is some question about the correct standard of review for an alleged error in penalty phase instructions in a capital case that was never raised before the district court.

As discussed in other sections of this opinion, in the ordinary criminal case and in the guilt phase of a capital prosecution, reviewability and reversibility of

an alleged jury instruction error not raised below are governed by K.S.A. 22-3414(3). We have not previously discussed in detail how that standard meshes with the "constitutional standard" for instruction error set out in United States Supreme Court cases—whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violated the Constitution. See *Jones v. United States*, 527 U.S. 373, 389-90, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999); *Victor v. Nebraska*, 511 U.S. 1, 6, 114 S. Ct. 1239, 127 L.Ed.2d 583 (1994); *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991); *Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L.Ed.2d 316 (1990). But we have relied on the "constitutional standard." *State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008); see also *State v. Gleason*, 299 Kan. at ___, (slip op. at 78). The issue in *Scott* had surfaced in the district court, but our *Gleason* opinion assumed applicability of the constitutional standard without discussing any potential overlap of the "clearly erroneous" language of K.S.A. 22-3414(3).

We need only raise, not settle, this standard of review issue today in order to provide the guidance needed for the district judge who must handle this case on remand. He or she will be trying to avoid error in the first place. And, regardless of the applicable standard of review, an earlier statement from this court in *Scott* and an opinion from a panel of the United States Court of Appeals for the Tenth Circuit should help him or her to do that.

Although *Scott* did not decide the issue raised in this case, it did say that it was "inadvisable" for an aggravating circumstances instruction to refer to a

generic crime rather than capital murder. 286 Kan. at 114. Likewise, in *United States v. Chanthadara*, 230 F.3d 1237, 1263-64 (10th Cir. 2000), the court said that it must be clear to a jury applying the Federal Death Penalty Act that the aggravating circumstance of pecuniary gain must flow from the victim's death, not an underlying felony.

Highly summarized, the motto on remand for drafting of the aggravating circumstances instruction should be: Caution Through Unmistakable Clarity. Given all of the clarification provided by the judge and by the prosecutor's closing argument here, we may ultimately have been able to determine that any error was not reversible under the governing standard of review, but the risk of reversal on this issue can easily be eliminated when this case returns to district court.

P12. INSTRUCTION ON ROLE OF MERCY

R. Carr argues that Judge Clark erred by defining mercy as a mitigating factor and linking it with sympathy for the defense, rather than conveying to the jury that mercy is "an impulse that comes from the grantor, regardless of whether the recipient deserves it." We briefly address this issue to provide guidance on remand.

The mitigating circumstances instruction in this case included the following on the role of mercy in the jury's deliberations:

> "Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than

death, even though they do not justify or excuse the offense.

"In this proceeding, you may consider sympathy for a defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed."

R. Carr argues that Judge Clark should have instead told jurors that they could "recommend mercy for the Defendant and sentence him to life imprisonment," regardless of whether mitigating circumstances outweighed aggravating circumstances. He did not raise this issue in the district court.

As noted in the previous section of this opinion, the intersection of the "clearly erroneous" language we apply in other contexts and the "constitutional standard" that has been applied to instruction challenges arising out of penalty phases in capital cases is unclear. See *State v. Scott*, 286 Kan. 54.

Again, we need not settle the issue today to dispose of this issue. Rather, we adhere to our precedent rejecting the argument that equating mercy to a mitigating factor is error at all. See *Kleypas*, 272 Kan. at 1035-36 (mercy instruction per se simply not required by federal, state law; nor is specific type of mercy instruction); see also *State v. Cheever*, 295 Kan. 229, 268, 284 P.3d 1007 (2012), *cert. granted in part* 133 S. Ct. 1460 (2013), and *vacated and remanded* 134 S. Ct. 596 (2013); *Scott*, 286 Kan. at 99. R. Carr's assertion that we have already moved away from this precedent in *State v. Marsh*, 278 Kan. 520, 102 P.3d

445 (2004), *rev'd and remanded* 548 U.S. 163 (2006), and *vacated in part* 282 Kan. 38, 144 P.3d 48 (2006), is without merit.

P13. VERDICT FORMS INSTRUCTION

In his separate appeal, J. Carr takes issue with the wording of the verdict forms instruction, No. 10, when read in combination with the wording of the Verdict Form (3). He argues that these elements of Judge Clark's instructions did not prepare jurors for a situation in which they were unanimous on the existence of one or more aggravating circumstances but were unable to agree upon whether mitigators outweighed the aggravators.

We notice this unassigned error on behalf of R. Carr under the authority of K.S.A. 2013 Supp. 21-6619(b).

Additional Factual and Procedural Background

The focal point of this issue is the third paragraph of Instruction No. 10, when combined with the verdict form for the jury's third option.

The first three paragraphs of the instruction, which informed the jury about the use of the three verdict form options they were given for each capital count, read:

> "When considering an individual defendant, if you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the particular defendant to death, you

must designate upon the appropriate verdict form with particularity the aggravating circumstances which you unanimously find beyond a reasonable doubt. That is Verdict Form (1).

"If you find that the evidence does not prove any of the claimed aggravating circumstances beyond a reasonable doubt, your presiding juror should mark the appropriate verdict form. That is Verdict Form (2). The court will fix a proper sentence for the particular defendant.

"If one or more jurors is not persuaded beyond a reasonable doubt that aggravating circumstances exist or that those found to exist do not outweigh mitigating circumstances, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death. That is Verdict Form (3). In that event, the court will fix a proper sentence for the particular defendant."

Verdict Form (3) was the same for each victim of capital murder. For Heather M. as the victim and R. Carr as the convicted defendant, it read:

"**VERDICT FORM** (3)

COUNT ONE (I)

CAPITAL MURDER

HEATHER [M.]

As to . . ., Capital Murder of Heather [M.], we the jury being duly sworn upon oath state that

we are unable to reach a unanimous verdict sentencing the defendant, Reginald D. Carr, Jr., to death.

(PLEASE INDICATE BY X IN THE BLANK SPACE)

_____A. We are not able to agree unanimously that the evidence proves an aggravated circumstance exists.

_____B. We are not able to agree that the aggravated circumstance(s) that were proved to exist outweighs the mitigating circumstance(s) shown to exist by the evidence.

Date: _____ _____

Presiding Juror"

Neither R. Carr nor J. Carr objected to Instruction No.10 or Verdict Form (3) at trial.

Adequacy of Instruction No. 10 and Verdict Form (3)

The State maintains that the clearly erroneous standard of K.S.A. 21-3414(3) should apply when we review an allegation of instruction error in the penalty phase of a capital case. See *State v. Kleypas*, 272 Kan. 894, 909, 939, 40 P.3d 139 (2001) (clearly erroneous standard governs in guilt phase of capital case). J. Carr's brief instead invokes the standard set out by the United States Supreme Court in *Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L.Ed.2d 316 (1990): "The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a reasonable likelihood that

the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 494 U.S. at 380.

We employed the *Boyde* standard plus the traditional Kansas non-clearly erroneous jury instruction review standard in *State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008):

> "In considering a claim that a jury instruction in the penalty phase of a capital trial prevented the jury from giving proper consideration to mitigating evidence, our standard of review is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). However, we consider the instructions as a whole and do not isolate any one instruction. Even if erroneous in some way, instructions do not result in reversible error if they properly and fairly state the law as applied to the facts of the case and could not reasonably have misled the jury. *State v. Edgar*, 281 Kan. 47, 54, 127 P.3d 1016 (2006)." 286 Kan. at 104-05.

But, as mentioned in Section 11 of this opinion, *Scott* did not involve a situation in which the jury instruction issue had not been raised in the district court.

Again, as in Sections 11 and 12 of this opinion, we need not traverse the thicket created by the overlap of clearly erroneous review and *Boyde* review today. The choice of standard of review on this issue is not

outcome-determinative, and our purpose is to assist the district court in avoiding error on remand. We therefore concentrate on whether there was error at all, rather than on whether any error would have qualified as reversible.

As discussed, under the Eighth and Fourteenth Amendments, a capital defendant must be allowed to put before the jury his evidence of mitigating factors; the jury must be allowed to consider and weigh relevant mitigating evidence; and the jury must have a method by which it can give effect to its consideration. The question before us is whether Instruction No. 10 and Verdict Form (3) were so confusing and misleading that the defendants' jury was deprived of a meaningful method of giving effect to mitigating evidence.

The first and second paragraphs of Instruction No. 10 covered what were, in essence, the "all" or "nothing" choices before the jury. In *Kleypas*, 272 Kan. at 1060-61, we said that K.S.A. 21-4624 contemplated only two options: Either (1) The jury would agree unanimously and beyond a reasonable doubt that one or more aggravating circumstances existed and that such aggravating circumstance or circumstances outweighed the mitigating circumstance or circumstances found to exist, meaning it would sentence the defendant to death; or (2) the jury would not unanimously find aggravating circumstances outweighed mitigating circumstances.

Verdict Forms (1) and (2) were consistent with the "all" and "nothing" options. It was clear that Verdict Form (1) was to be used when the jury unanimously found the existence of an aggravating circumstance or

circumstances and that the aggravating circumstance or circumstances outweighed any mitigators. Verdict Form (2) was to be used when the jury found no aggravators existed. It was clear that, in such a situation, there was no need for the jury to reach the next step, weighing of aggravators and mitigators.

Verdict form (3) staked out the middle ground—when jurors agreed unanimously that an aggravating circumstance or circumstances existed but could not agree unanimously on whether mitigators outweighed aggravators. But what was fairly clear in this verdict form was garbled in the third paragraph of Instruction No. 10, which we repeat here for ease of reference:

> "If one or more jurors is not persuaded beyond a reasonable doubt that aggravating circumstances exist *or that those found to exist do not outweigh mitigating circumstances*, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death." (Emphasis added.)

The italicized portion of the instruction is simply wrong because it contains an extra "not" that reverses the meaning of the condition precedent to use of Verdict Form (3). Under the controlling law at the time of defendant's trial, the correct italicized portion should have read "or that those found to exist outweigh mitigating circumstances."

This error may or may not have met the threshold for reversal under either K.S.A. 21-3414(3) or the

Boyde standard. It does not matter. What matters is that it can, and should, be easily corrected on remand.

P14. Defendant's Age of 18 or Older at Time of Capital Crime

After briefs were filed in this case, R. Carr sought and received permission to file a supplemental brief based on this court's decision in *State v. Cheever*, 295 Kan. 229, 265, 284 P.3d 1007 (2012) (Jessica's Law precedent on necessity of instruction that jury find defendant's age of 18 or older at time of crime may apply in capital case penalty phase), *cert. granted in part* 133 S. Ct. 1460 (2013) *and vacated and remanded*, 134 S. Ct. 596 (2013). He asserted that Judge Clark erred by failing to instruct the jury it must find beyond a reasonable doubt that the defendants were 18 years old or older at the time of the capital murders, in order for the death penalty to apply. The State filed a responsive brief.

As in *Cheever*, we need not reach the merits of this issue today. Now that the State is aware of this potential appellate issue, it is highly unlikely that it will permit the jury in any new, severed penalty phase to begin deliberations without an instruction on R. Carr's age at the time of the quadruple homicide.

P15. No-Adverse-Inference Instruction

R. Carr sought a no-adverse-inference instruction, which, when given in a guilt phase of a criminal prosecution at the time of the trial, would have provided:

> "A defendant in a criminal trial has a constitutional right not to be compelled to

> testify. You must not draw any inference of guilt from the fact that the defendant did not testify, and you must not consider this fact in arriving at your verdict." PIK Crim. 3d 52.13.

J. Carr opposed the instruction, and Judge Clark did not give it.

The giving of such an instruction, if requested in a penalty phase, has been required in at least three of our sister jurisdictions and has been described as the wisest course in a fourth.

In *State v. Storey*, 986 S.W.2d 462, 463-64 (Mo. 1999) (en banc), the Missouri Supreme Court reasoned:

> "The privilege against self-incrimination guarantees the right to remain silent and the right not to have adverse inferences drawn from exercising the privilege. U.S. Const. amend. V; Mo. Const. art. I, sec. 19; *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S. Ct. 1112, 1121, 67 L. Ed. 2d 241 (1981). '[T]he Fifth Amendment requires that a criminal trial judge must give a "no-adverse-inference" jury instruction when requested by a defendant to do so.' *Carter*, 450 U.S. at 300. There is 'no basis to distinguish between the guilt and penalty phases of [a] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.' *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S. Ct. 1866, 1872-73, 68 L. Ed. 2d 359 (1981). Therefore, when a defendant does not testify in the penalty phase of a capital murder trial, the court must give a 'no-adverse-inference' instruction if the defendant so requests."

See *State v. Munn*, 56 S.W.3d 486, 501-02 (Tenn. 2001) (right against self-incrimination "so fundamental that [it] should be protected at all stages of criminal process"; criminal defendant has constitutional right to no-adverse-inference instruction during penalty phase when properly requested); *Burns v. State*, 699 So. 2d 646, 651 (Fla. 1997) (right against self-incrimination continues through sentencing phase of capital murder trial; failure to give requested no-adverse-inference instruction subject to harmless error analysis); see also *State v. Arther*, 290 S.C. 291, 298, 350 S.E.2d 187 (1986) (absent request, failure to give instruction not reversible error; but "better course is to give a no adverse inference charge in both the guilty and penalty phases of a capital trial").

However, the United States Supreme Court has recently held that such a rule is not so clearly established by its precedent. See *White v. Woodall*, ___ U.S. ___, 134 S. Ct. 1697, 1703, 188 L. Ed. 2d 698 (2014) (state court's refusal to give no-adverse-inference instruction did not warrant federal habeas relief under Antiterrorism and Effective Death Penalty Act of 1996; Act requires showing of unreasonable application of Supreme Court precedent; discussing earlier cases holding court may not draw adverse inference from defendant's silence when determining facts about crime that bear on severity of sentence).

Again, we need not reach the merits of this issue today or parse the applicable standard of review, because the situation giving rise to this claim can easily be avoided on remand. Assuming the State goes forward with severed penalty phase trials, the district judge will be able to avoid any question on appeal

about a no-adverse-inference instruction by giving the instruction in the case of the defendant who desires it and not giving the instruction in the case of the defendant who does not.

P16. Capital Punishment for Aider and Abettor under K.S.A. 21-3205

This issue was raised in J. Carr's brief to this court. We notice it on behalf of R. Carr under the authority of K.S.A. 2013 Supp. 21-6619(b), but we do not reach its merits.

The record on this appeal does not establish which of the two defendants was convicted of the murders of Heather M., Aaron S., Brad H., and Jason B. as a principal and which as an aider and abettor. Without that information, there is no factual predicate for examination of this issue.

P17. Capital Punishment for Aider and Abettor under Section 9

This issue was raised in J. Carr's brief to this court. We notice it on behalf of R. Carr under the authority of K.S.A. 2013 Supp. 21-6619(b), but we do not reach its merits.

The record on this appeal does not establish which of the two defendants was convicted of the murders of Heather M., Aaron S., Brad H., and Jason B. as a principal and which as an aider and abettor. Without that information, there is no factual predicate for examination of this issue.

P18. Prosecutorial Misconduct

The defendants challenge what they believe to be numerous instances of prosecutorial misconduct during the penalty phase of their trial.

With the exception of one aspect of one issue raised by J. Carr in his direct appeal and unique to him, which we address in our opinion in his case to provide guidance, we need not reach the merits of the prosecutorial misconduct challenge today. Now that the State has been put on notice of the behaviors and comments by its prosecutors likely to give rise to appellate challenge, we are certain it will consider carefully whether engaging in the same behaviors or making the same or similar comments during any proceedings pursued on remand would be worth the substantial risk of undermining those proceedings.

P19. Double Jeopardy

J. Carr claims in his separate appeal that the wording of the verdict forms in this case pose a risk of double jeopardy in the future. We notice this claim on behalf of R. Carr under the authority K.S.A. 2013 Supp. 21-6619(b).

Under the authority of *State v. Burnett*, 293 Kan. 840, 849, 270 P.3d 1115 (2012), we regard this claim as unripe and thus do not reach its merits.

P20. Execution Protocol

R. Carr alleges that the Kansas execution protocol is constitutionally deficient in three ways—because no doses of the execution drugs are specified, because qualifications for the IV team are not specified, and

because there is no directive to ensure that the prisoner is unconscious before a second and a third drug are administered.

This issue was raised by way of pretrial motion in the district court, and the Secretary of the Department of Corrections testified at that time that the execution protocol was "evolving." Judge Clark first said at the hearing on the motion that it was unripe and then in his written ruling that he presumed the Secretary of Corrections "will discharge the duties assigned to [him] in a constitutional manner, therefore the defendants' motion shall be overruled." Judge Clark made no findings of fact and issued no other conclusions of law.

This sparse record, made 12 years ago while the Kansas protocol was "evolving," is simply inadequate for us to address the protocol's constitutionality as of today. Moreover, given our other rulings in this opinion, R. Carr's execution is merely a possibility, not a certainty. We therefore regard the issue as unripe, see *Burnett*, 293 Kan. at 850, and do not address its merits.

CONCLUSION FOR PENALTY PHASE

Because the district judge's failure to sever the penalty phase of defendants' trial violated R. Carr's Eighth Amendment right to an individualized sentencing determination and cannot be declared harmless error, the death sentence on R. Carr's remaining K.S.A. 21-3439(a)(6) conviction for the murders of Heather M., Aaron S., Brad H., and Jason B. is vacated. This case is remanded to district court for further proceedings consistent with this opinion.

* * *

BEIER, J., concurring in part and dissenting in part: This case is hard. It is beyond hard. And those of us who have made a life in the law often repeat an old saying: Hard cases make bad law. See *Northern Securities Co. v. United States*, 193 U.S. 197, 364, 24 S. Ct. 436, 48 L. Ed. 679 (1904) (Holmes, J., dissenting); see also *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 899, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (recognizing legal aphorism).

Unfortunately, it appears that three of the majority's decisions on the guilt phase of this case are examples of why this old saying came to be. I must, therefore, respectfully dissent.

I. CUMULATIVE ERROR

Considered collectively, cumulative error

> "may be so great as to require reversal of a defendant's conviction. The test is whether the totality of the circumstances substantially prejudiced the defendant and denied him or her a fair trial. No prejudicial error may be found under the cumulative error doctrine if the evidence against the defendant is overwhelming. *State v. Cosby*, 285 Kan. 230, Syl. ¶ 9, 169 P.3d 1128 (2007)." *State v. Dixon*, 289 Kan. 46, 71, 209 P.3d 675(2009).

"If any one of the errors involves a constitutional violation, the harmless error standard stated in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967), must be applied to the determination of whether the defendant was denied a fair trial." *State v. Armstrong*, 299 Kan. 405, Syl. ¶ 10,

324 P.3d 1052 (2014). That is the standard that applies here.

A majority of this court has identified 11 errors in Reginald Carr's trial on guilt.

- Six members of the court agree that District Court Judge Paul Clark erred by refusing to sever.
- All seven members of the court agree that Judge Clark committed reverse *Batson* error by seating W.B after peremptory challenge by the defendants.
- All seven members of the court agree that Judge Clark erred in allowing the admission of Linda Ann Walenta's statements through law enforcement testimony.
- All seven members of the court agree that Judge Clark erred in interpreting and applying the third-party evidence rule and the hearsay rule, preventing R. Carr from pursuing his defense to the Birchwood crimes.
- All seven members of the court agree that Judge Clark gave a faulty instruction on the sex-crime-based capital murders.
- All seven members of the court agree that three of the multiple-homicide-based capital murder convictions were multiplicitous with the first.
- All seven members of the court agree that the district court lacked subject matter jurisdiction over any sex crime charges based on coerced victim-on-victim sex acts.

- All seven members of the court agree that one of R. Carr's convictions for the rape of Holly G. was multiplicitous with the other.
- All seven members of the court agree that Judge Clark erred by automatically excluding testimony from an expert on the reliability of eyewitness identifications.
- All seven members of the court agree that Judge Clark erred in instructing the jury to consider an eyewitness' degree of certainty.
- All seven members of the court agree that Judge Clark erred by giving an aiding and abetting instruction that discussed foreseeable crimes.

Two of these errors, standing alone, at least arguably require reversal of *all* of R. Carr's convictions.

It is hard to imagine, for instance, a single error with more pervasive likely impact on the direction and content of the evidence before the jury than Judge Clark's refusal to sever the defendants' prosecutions. See *State v. Martin*, 234 Kan. 548, 551-52, 673 P.2d 104 (1983) (antagonistic defenses, weaker evidence against one codefendant lead to reversal of codefendant's convictions); *Neill v. State*, 827 P.2d 884, 885-90 (Okla. Crim. 1992) (antagonism between defendants arose out of testimony codefendants elicited on cross-examination, statements made by counsel during opening closing; "no judge could have protected the defendants against their own hostility"; "each [codefendant] could only convince the jury of his own innocence by convincing them to convict his [codefendant]"; irreparable prejudice from failure to sever obvious); see also *People v. Bailey*, 182 Ill. App.

3d 867, 870-71, 538 N.E.2d 718 (1989) (trial "more of a contest between two defendants than between the People and each defendant"; reversible prejudice also arose from admission of codefendant's statements to law enforcement); *State v. Sauls*, 356 N.W.2d 516, 517-19 (Iowa 1984) (law enforcement statements, trial testimony of each codefendant implicated other codefendant); *Lafevers v. State*, 819 P.2d 1362, 1366 (Okla. Crim. 1991) (no option but to reverse when codefendants' "interlocking" statements placed both at crime scene but each claimed other committed rape, murder, burning of victim; both defendants testified; other errors in joint trial also identified); *Silva v. State*, 933 S.W.2d 715, 717-19 (Tex. App. 1996) (joint trial prevented admission of codefendant's statement to impeach his testimony; clear prejudice shown).

And, as the majority describes, 16 of our sister states have either stepped into or already occupied the space expressly left open by the United States Supreme Court in its decision in *Rivera v. Illinois*, 556 U.S. 148, 161-62,129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009): They have declared reverse *Batson* error is not subject to harmlessness analysis or have treated it in a way that makes this rule evident. See *State v. Mootz*, 808 N.W.2d 207, 225-26 (Iowa 2012) ("A defendant could only show prejudice by showing that the juror he sought to remove was biased. However, if the juror was biased, then the juror would be removable for cause, and the question regarding the peremptory challenge would become moot."); see also *Zanders v. Alfa Mut. Ins. Co.*, 628 So. 2d 360, 361 (Ala. 1993) (civil action); *State v. Wright*, 86 Conn. App. 86, 95-98, 860 A.2d 278 (2004); *Elliott v. State*, 591 So. 2d 981, 987 (Fla. Dist. App. 1991); *Jackson v. State*, 265 Ga. 897, 899, 463

S.E.2d 699 (1995); *State v. Pierce*, 131 So. 3d 136, 144 (La. App. 2013); *Parker v. State*, 365 Md. 299, 311, 778 A.2d 1096 (2001); *Commonwealth v. Hampton*, 457 Mass. 152, 164-65, 928 N.E.2d 917 (2010); *State v. Campbell*, 772 N.W.2d 858, 862 (Minn. App. 2009); *Hardison v. State*, 94 So. 3d 1092, 1101-02 (Miss. 2012); *People v. Hecker*, 15 N.Y.3d 625, 662, 917 N.Y.S.2d 39, 942 N.E.2d 248 (2010); *State v. Short*, 327 S.C. 329, 335-36, 489 S.E.2d 209 (Ct. App. 1997), *aff'd* 333 S.C. 473, 511 S.E.2d 358 (1999); *State v. Yai Bol*, 190 Vt. 313, 322-23, 29 A.3d 1249 (2011); *State v. Vreen*, 143 Wash. 2d 923, 932, 26 P.3d 236 (2001); *People v. Gonzales*, No. B224397, 2012 WL 413868 (Cal. App. 2012) (unpublished opinion); *State v. Wilkes*, No. 93-2408-CR-FT, 1994 WL 5547 (Wis. App. 1994) (unpublished opinion). And, 16 years before the United States Supreme Court decided *Rivera*, a panel of our Court of Appeals recognized the unknowable harm done by a reverse *Batson* error: "The proper use of the peremptory challenge is vital to the conduct of a criminal defendant's defense. . . . Although it may seem minimal, the deprivation of even one valid peremptory challenge is prejudicial to a defendant and may skew the jury process." *State v. Foust*, 18 Kan. App. 2d 617, 624, 857 P.3d 1368 (1993).

The overarching goal of *Batson*—race-neutral jury selection—and the record demonstrating that Judge Clark expressly denied R. Carr's selection of W.B. as the target of his last peremptory challenge because of R. Carr's and W.B.'s shared race are in irreconcilable conflict. And, to me, the rationales and outcomes of our 16 sister jurisdictions and our Court of Appeals treating such a conflict as automatically reversible, standing alone, make sense. What good is a right to a

peremptory challenge if violation of the right inevitably has no remedy?

But neither the court nor I need go this far in this case.

Under the cumulative error doctrine, I would hold that, when the refusal to sever and reverse *Batson* errors are considered in conjunction with the nine other errors the majority of the court has identified, reversal of all of R. Carr's convictions is required. Research reveals no other Kansas appellate case affirming in the face of such a large number of mostly interlocking errors. Despite the public passion attached to this hard case—indeed, in part because of the public passion attached to this hard case—we should not begin disregarding errors that numerous or mutually reinforcing here.

I readily acknowledge that the evidence against R. Carr on the Andrew Schreiber and Birchwood incidents was unusually strong. But it was not inevitably invincible, particularly if the governing rules had shifted in the directions the majority holds that they should have. My colleagues and I simply cannot know with the degree of comfort generally required in a death penalty case, see *State v. Marsh*, 278 Kan. 520, 525, 102 P.3d 445 (2004), *rev'd and remanded*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006), *and vacated in part*, 282 Kan. 38, 144 P.3d 48 (2006) (heightened scrutiny applies to review of capital trial proceedings) (citing *Beck v. Alabama*, 447 U.S. 625, 637-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 [1980]), that the contours of a severed guilt phase with no reverse *Batson* error and in which R. Carr was permitted to defend himself under a correct application of the

third-party evidence and hearsay rules would have differed so little as to be insignificant. Any anticipated change in perspective could have intensified, had expert testimony on modern research on eyewitness identification been permitted, or had the aiding and abetting and eyewitness instructions contained no error.

II. INSUFFICIENCY OF EVIDENCE ON FELONY MURDER

I also dissent from the majority's decision that the State's evidence of the attempted aggravated robbery underlying R. Carr's felony-murder conviction in the killing of Walenta was sufficient. There was simply no proof that the man who accosted and shot Walenta in her driveway was trying to rob her, as opposed to committing or attempting to commit another inherently dangerous felony.

The hole in the prosecution's case on the Walenta felony murder is far larger than that facing the State in the recent case *State v. McBroom*, 299 Kan. __, 325 P.3d 1174 (2014). In that case, the State relied on evidence from a string of burglaries committed by two friends to support one friend's participation in another burglary that led to the killing of the homeowner. We affirmed.

R. Carr's participation was not the missing piece here. In fact, the State's evidence on that was sufficient to satisfy a reasonable factfinder. The missing piece was the entire underlying felony. The State charged and Judge Clark instructed on only aggravated robbery. The circumstances surrounding the crime against Walenta were different enough from those when Schreiber and the five friends from Birchwood

were the victims that the evidence against R. Carr in two other incidents could not supply the entire underlying crime in the Walenta incident.

III. Insufficiency of Evidence on Digital Rape

Finally, I also dissent from the majority's holding that the evidence against R. Carr for aiding and abetting J. Carr's rape of Holly G. through her digital self-penetration was sufficient. As base and coarse as J. Carr's command may have been, based on Holly G.'s testimony, it did not eliminate other options for the achievement of his goal. On this evidence, a rational factfinder could not find guilt beyond a reasonable doubt on Count 41. Accordingly, I would affirm R. Carr's Count 42 conviction for aiding and abetting J. Carr's rape of Holly G., because reversal of the Count 41 conviction renders any multiplicity issue moot.

Conclusion

The facts of this case are so vivid, the wrongs done to the victims so callously inflicted, that any human cannot help to be tempted by the siren song of retribution. The song is what makes this case hard; it robs the sailor of reason. But it is the job of judges to resist making bad law, even when the siren's seductive power is at its height. This hard case must be treated as other, less hard cases are treated.

I would reverse all of R. Carr's convictions under the doctrine of cumulative error and would remand the entire case to the district court for further proceedings scrubbed of the 11 errors the majority of the court has identified.

LUCKERT and JOHNSON, JJ., join the foregoing concurring and dissenting opinion.

* * *

JOHNSON, J., concurring in part and dissenting in part: I join Justice Beier's separate opinion, but I also write separately to disagree with the majority's holding that the pretrial publicity in this case did not create the kind of lynch mob mentality that warrants a change of venue. This court's history of never reversing a change of venue denial, together with the majority's holding in this case, suggest to me that we have set the bar so high that nothing will suffice short of an actual mob storming the courthouse, carrying burning torches and a rope tied with a hangman's noose.

In my view, we should do a better job of protecting the cornerstone of our criminal justice system—the right to a fair and impartial jury. And we should do so without regard to whether we agree with the jury's verdict in a particular case and even though we understand the toll that a retrial will take on the innocent victims. A right that is not enforced is no right at all. Moreover, the courts are normally the only place that an individual can find protection for the rights that others more powerful would deny. See *Law, Justice, and the Holocaust*, Meinecke and Zapruder (2009) (describing how Supreme Court rulings facilitated the elimination of individual rights for Jews in Germany from 1933 to 1945).

As the majority notes, the right to a trial by an impartial jury is guaranteed by both our federal and state constitutions. Neither constitution makes any exception for cases in which there is strong evidence

that the defendant committed brutal and despicable criminal acts. To the contrary, the Fourteenth Amendment to the United States Constitution declares in relevant part: "[N]or shall *any* State deprive *any* person of life, liberty, or property, without due process of law." (Emphasis added.) Our Kansas Constitution Bill of Rights, § 10, provides that "a speedy public trial by an impartial jury" shall be provided "[i]n *all* prosecutions." (Emphasis added.) Likewise, our legislature has mandated that a trial court "*shall order* that the case be transferred" where the prejudice against the defendant precludes a fair and impartial trial in the original county. (Emphasis added.) K.S.A. 22-2616(1). Indeed, this court has explicitly held that "[n]either law nor basic justice can tolerate" a rule "that the greater the evidence against a defendant, the less right that defendant has to a fair trial." *State v. Tosh*, 278 Kan. 83, 97, 91 P.3d 1204 (2004). To the contrary, the "[d]enial of a fair trial violates the due process rights of the guilty defendant just as surely as those of the innocent one." 278 Kan. at 97.

And a fair trial requires that *all* of the jurors sitting in judgment of the criminal defendant must commence the trial presuming that the defendant is innocent. That initial state of mind is mandated because "[u]nder our theory of criminal jurisprudence in this nation, the defendant is clothed with a presumption of innocence until he is proven to be guilty beyond a reasonable doubt by the State." *State v. Williams*, 229 Kan. 646, 663-64, 630 P.2d 694 (1981). It is not enough for a juror to be open to the possibility that the evidence presented at trial will dissuade the juror that the defendant is guilty. It is not enough for the juror to "hope" that he or she will be able to set aside preconceived judgments of

guilt or to "try" to disregard inculpatory information to which the juror was exposed prior to trial. Instead, if a juror's state of mind with respect to the case or to the defendant is such as to create "doubt that he [or she] can act impartially and without prejudice to the substantial rights of [the defendant]," the court has grounds to strike that juror for cause. K.S.A. 22-3410(2)(i) (setting forth one of the grounds for a challenge for cause). In short, the slate upon which the State shall write its guilt-proving evidence must be clean when the trial begins.

Here, the evidence presented by the defense in support of its initial pretrial motion for a change of venue established that a bias or prejudice against the defendant was pervasive throughout Sedgwick County. Nearly everyone surveyed in Sedgwick County (96%) was aware of the case. Almost three out of every four Sedgwick Countians (74.1%) thought the defendant was either definitely guilty or probably guilty, and nearly all of those people (72.3% of those surveyed) thought the evidence of guilt was overwhelming or strong. For the respondents that had either engaged in personal discussions about the case or overheard such discussions, the bias toward believing the defendant to be guilty was an overwhelming 86% and 82%, respectively, *i.e.*, more than four such persons out of five.

Putting the survey results in the perspective of a 12-person jury, the statistical probability was that 9 jurors in Sedgwick County would start the trial holding the belief that, at the least, there was strong evidence that the defendant was probably guilty. As the survey expert predicted, the results obtained during the

survey—conducted a year after the incidents—did not change much by the time of trial, as reflected in the pretrial questionnaires. The remaining one-fourth—or less—of the jury pool who had not predetermined the defendant's guilt left him scantily clad in the presumption of innocence. Such nakedness does not pass constitutional muster or meet the statutory mandate.

The survey also revealed that a figurative lynch mob mentality was not inevitable in this state. In Wyandotte County, only about one in five persons (22%) believed defendant to be guilty and about one in six (16%) thought the evidence of guilt was strong or overwhelming. Ironically, whereas 74.1 % of the Sedgwick County surveyed citizens believed defendant was guilty, there was nearly as high a percentage of Wyandotte County surveyed citizens (70.5%) who were not even *aware* of this case. Thus, the available wardrobe of unbiased venire persons in Wyandotte County was sufficient to clothe the defendant in the presumption of innocence to which he was constitutionally and statutorily entitled, *i.e.*, a change of venue would have provided a reasonable opportunity for a fair trial.

The majority divides the change of venue analysis into two parts and first determines whether we can presume prejudice prior to voir dire because "'the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community.'" (Quoting *Goss v. Nelson*, 439 F.3d 621, 628 [10th Cir. 2006], citing *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 [1963]). The majority then utilizes the *Skilling* factors to analyze

whether it believes that the publicity in this case would likely have caused such an unacceptable level of prejudice for the defendant. See *Skilling v. United States*, 561 U.S. 358, 381-85, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). But we need not subjectively ruminate on the degree of prejudice in this case. We have an objective manifestation of the effects of the publicity. As discussed above, the defense provided the district court with the results of a survey—which the judge found to be "valid"—and further provided the court with the testimony of a person—officially designated as an "expert" by the court—who explained what the survey results meant.

Yet, the district court inexplicably ignored the evidence that it declared to be valid. I cannot be as charitable as the majority about the district court rulings. Initially, after being presented with the above-summarized numbers comparing Sedgwick County to Wyandotte County, the district court inscrutably found "that the venue in which defendants will be assured of the greatest number of venire persons free of bias or prejudice from whom a jury may be selected to decide the case solely on the facts in evidence, viewed by the light of the instruments of law, is Sedgwick County, Kansas." But the evidence established the exact opposite, *i.e.*, Wyandotte County had the greatest number of venire persons who were free of bias or prejudice. One simply cannot spin any kind of inference from the evidence that would support the district court's ruling. And even affording the district court the highest level of deference, we would have to find an abuse of discretion where the court's ruling was based upon an error of fact. See *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert.*

denied 132 S. Ct. 1594 (2012). Subsequently, the remaining rulings on the motions for change of venue were equally unsatisfactory, especially given the magnitude of what was at stake in this prosecution.

The majority gives scant credence to the survey results, as well. It principally relies on the fact that this court has previously glossed over such survey evidence. I cannot join in perpetuating the practice of dismissing out-of-hand statistically valid evidence that has compelling evidentiary value on the question presented. In *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, Syl. ¶ 2, 214 P.3d 676 (2009), we explained that a history of incorrectly decided cases is not compelling and that this court is not inexorably bound by erroneous or unsound rulings. Here, the survey results provided the answer to the question the majority was contemplating, *i.e.*, whether "'the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community.'" (quoting *Goss*, 439 F.3d at 628). The comparative survey numbers clearly revealed a pervasive prejudice in Sedgwick County that would make finding an unbiased jury pool a statistical improbability. Ignoring that evidence is erroneous and unsound, if not blatantly unconstitutional.

Moving to the actual prejudice prong and reviewing the voir dire does not change my mind; the district court committed reversible error when it refused to change the venue of this trial at every stage of the process where it was requested. The record establishes at least a "reasonable certainty" that the defendant could not obtain a fair trial in Sedgwick County. Perhaps the trial court beat the pretrial statistical

probability that the jury would contain 9 biased jurors out of 12, but not by much.

Again, I cannot be as forgiving as the majority with respect to the trial court's participation in the questioning of the potential jurors. The court repeatedly provided venire persons with the magic words which would permit the court to strike those with misgivings about the death penalty, while passing for cause those who were predisposed to finding the defendant guilty and/or were mitigation-impaired with respect to the death penalty. Moreover, the court allowed the prosecution to overtly lead the potential jurors into saying or agreeing with statements that would support the result that the State wanted. In my view, the manner in which the questioning was conducted made a sham out of the process. Instead of uncovering disqualifying bias and prejudice, the voir dire questioning in this case too often served to camouflage it.

If nothing else, the voir dire questioning in this case should call into question the bona fides of the fourth *Higgenbotham* factor, *i.e.*, the care exercised and the ease encountered in the selection of the jury. See *State v. Higgenbotham*, 271 Kan. 582, 592, 23 P.3d 874 (2001). Obviously, if the court is disinclined to grant defense challenges for cause and/or is prone to rehabilitating those venire persons making a questionable response, the jury selection process will be eased and expedited. But that does not necessarily signal an absence of prejudice. Moreover, the efficacy of utilizing jury questionnaires and individual voir dire is certainly diluted, if not outright negated, by the tack of

leading the prospective jurors into saying what they believe the judge or prosecutor want them to say.

My last comment on the change of venue ruling deals with the majority's use of the deferential abuse-of-discretion review standard to tip the scales in favor of affirming the change of venue denial. I certainly recognize that a judge observing a potential juror's response to voir dire questioning is in a better position to gauge that person's credibility and thereby assess the person's bias and prejudice. But in my view, the district court's initial ruling—that Sedgwick County had more venire persons free of bias and prejudice—fit squarely within the traditional definition of an abuse of discretion, because that "judicial action [was] arbitrary, fanciful, or unreasonable." *Ward*, 292 Kan. at 550. Given the undisputed survey evidence, no reasonable person would have taken the judge's view. Thereafter, I would not use deference as a mechanism to cover for the trial court's initial abuse of discretion, especially in light of the voir dire procedures it employed. To the contrary, I would find reversible error.

Finally, to avoid unnecessarily extending this opinion, I only briefly mention that I would revisit our prior decisions equating the "cruel *or* unusual" language in § 9 of the Kansas Constitution Bill of Rights with the "cruel *and* unusual" language in the Eighth Amendment to the United States Constitution. Recently, in *Gannon v. State*, 298 Kan. 1107, Syl. ¶ 5, 319 P.3d 1196 (2014), we said:

> "Because constitutions are the work of the people, the best rule for ascertaining their intention is to abide by the language they have

> used. It is reasonable to presume that every word in the constitution has been carefully weighed, and that none are inserted, and none omitted, without a design for so doing."

If we meant what we said in *Gannon*, then we should not read the word "or" to mean "and" when interpreting § 9 of our Kansas Constitution Bill of Rights. The set of punishments that is either cruel or unusual is necessarily larger than the set of punishments that is both cruel and unusual. For instance, death is arguably a cruel punishment, even if it is not an unusual one in this country.

* * *

BILES, J., concurring in part and dissenting in part: I agree Reginald Carr's sentencing must be reversed and remanded for new proceedings because the district court failed to sever the cases following the convictions. I write separately to note my disagreement with the majority's dicta in the section entitled "P10. Burden of Proof on Mitigating Factors." Slip op. at 378. The majority argues R. Carr's sentence was imposed in violation of the Eighth Amendment to the United States Constitution because the district court failed to explicitly instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt. I disagree.

As noted in more detail in my dissent in *State v. Gleason*, No. 97,296, 299 Kan. ___, ___ P.3d ___ (filed July 18, 2014) (slip op. at 100), the majority's conclusion defies the United States Supreme Court's established Eighth Amendment jurisprudence and lacks any persuasive analysis articulating why the

circumstances in this case justify a departure from that precedent. The issue for Eighth Amendment purposes is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). The majority's conclusion is that a per se violation of the Eighth Amendment occurs if a jury instruction correctly states that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt but fails to affirmatively state that mitigation evidence need not be proven beyond a reasonable doubt.

But this alone cannot justify reversal under controlling Eighth Amendment precedent. See *Kansas v. Marsh*, 548 U.S. 163, 173, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006); *Walton v. Arizona*, 497 U.S. 639, 651, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); see also *Smith v. Spisak*, 558 U.S. 139, 130 S. Ct. 676, 175 L. Ed. 2d 595 (2010) (instructions and jury forms at penalty phase did not violate Eighth Amendment by requiring jury unanimity as to existence of mitigating factors; instructions and forms did not explicitly advise jury mitigating circumstances need not be unanimously found). The next step must be to decide in the absence of the instruction whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. The majority is wrong when it cuts the analysis short and concludes

the failure to simply instruct the jury on mitigation forces an automatic reversal. Slip op. at 378.

The Eighth Amendment does not compel our directive in *State v. Kleypas*, 272 Kan. 894, 1078, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002), that any mitigating circumstance instruction must inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt. See *Marsh*, 548 U.S. at 173 (holding *Walton* compelled conclusion Kansas capital sentencing scheme satisfied Eighth Amendment requirements because Kansas scheme was functionally identical to scheme found constitutional in *Walton*, except it provided benefit to defendants by placing no evidentiary burden on them). A finding that R. Carr's jury instructions did not conform to the *Kleypas* requirement is not an adequate basis for concluding R. Carr's federal Eighth Amendment rights were violated and reversal is required.

I dissent from that portion of the opinion.

MORITZ, J., joins the dissenting portion of the foregoing concurring and dissenting opinion.

* * *

MORITZ, J., concurring in part and dissenting in part: I write separately for several reasons, initially to register my disagreement with my colleagues, who plaintively seek respect for their position that the "hard" and correct decision in this case is to overturn all of Reginald Carr's convictions and, consequently, his death sentence. Slip op. at 394 (Beier, J., concurring in part and dissenting in part).

Justice Beier's separate opinion boldly declares that the majority, in affirming Reginald Carr's convictions, has opted for the easy way out by bowing to public pressure in this high profile case. While it might be satisfying to respond to this harsh and unjustified criticism, I will not waste precious judicial time and resources doing so. Suffice it to say, I feel no pressure or compulsion other than the ever-present compulsion to follow the law rather than my conscience or personal views. Ultimately, following the law, I would find that Reginald Carr received a fair trial, and I would affirm *both* his capital murder conviction and the sentence of death imposed by a jury comprised of 12 of his peers.

Setting aside the rhetoric of that separate opinion, my first substantive purpose in writing this separate opinion is to concur with the majority opinion. I concur because while I agree with the majority's decision to affirm Reginald Carr's convictions, including one capital murder conviction, I disagree with the majority's conclusion that the district court abused its discretion in refusing to sever the defendants' guilt phase trial. Consequently, in conducting a harmless error analysis in the guilt phase, I would not consider the joinder as error, which would effectively strengthen the majority's affirmation of Reginald Carr's convictions. However, even considering the joinder as error, I believe the majority properly finds any errors in the conviction phase harmless and Reginald Carr's cumulative error argument unpersuasive in light of the incredibly overwhelming evidence of guilt. Therefore, I concur with the majority opinion affirming Reginald Carr's convictions, including one capital murder conviction.

My second substantive, and perhaps more significant, purpose is to dissent to the majority's decision to reverse and remand Reginald Carr's death sentence. Stated conversely, I would affirm the jury's imposition of the death penalty against Reginald Carr. Specifically, I would find the district court did not err in refusing to sever the defendants' penalty phase trial. But even considering a joinder error in the penalty phase, I would affirm the jury's imposition of the death penalty for Reginald Carr. As I detail below, given the unusually egregious facts of this case, Holly G.'s powerful testimony, the overwhelming evidence of aggravating circumstances found by the jury, and the lack of persuasive mitigating evidence, I would hold beyond a reasonable doubt that the jury's decision to impose the death penalty was not attributable to any joinder error below.

Additionally, I join that portion of Justice Biles' separate opinion dissenting from the majority's "alternative" holding that the district court erred in failing to instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt. As Justice Biles aptly points out, the majority's alternative holding is dicta. I prefer to characterize it as a "belt and suspenders" approach designed to hitch up the majority's already sagging rationale. In any event, like my colleague, I would find that this was not constitutional error and provides no basis for reversal, much less the independent basis suggested by the majority.

The district court did not abuse its discretion in refusing to sever the defendants' guilt phase trial.

Severance should be granted under K.S.A. 22-3204 when it appears necessary to avoid prejudice and ensure a fair trial to each defendant. *State v. Davis*, 277 Kan. 231, 239, 83 P.3d 182 (2004) (citing *State v. Aikins*, 261 Kan. 346, 360, 932 P.2d 408 [1997]); see *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) ("[A] district court should grant a severance . . . only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.").

I agree with the majority that Reginald Carr and Jonathan Carr presented antagonistic defenses. But the existence of antagonistic defenses is only one of several "'factors to be considered [by the trial court] in determining whether there is sufficient prejudice to mandate severance.'" *Davis*, 277 Kan. at 240 (quoting *State v. Butler*, 257 Kan. 1043, 1063, 897 P.2d 1007 [1995], *modified on other grounds* 257 Kan. 1110, 916 P.2d 1 [1996]). Unlike the majority, I would conclude the existence of antagonistic defenses, even coupled with the exclusion of weak third-party evidence, failed to establish sufficient risk of prejudice to compel the district court to sever the trial. See *Zafiro*, 506 U.S. at 538-39 (noting the presence of mutually antagonistic defenses is not prejudicial *per se*, and severance is not compulsory, "even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion"). Consequently, I would conclude the district court did not abuse its discretion in failing to sever the guilt phase of the trial.

But, like the majority, I would conclude that if the district court erred in failing to sever the guilt phase, the error was harmless. I need not fully recount that evidence since it is more fully discussed below and in the majority's harmless error analysis. Suffice it to say that biological evidence—including Heather's blood on his undershorts—strongly connected Reginald Carr to the crime, as did compelling physical and circumstantial evidence—including footprints matching Reginald Carr's at Birchwood and Reginald Carr's attempt to flee.

The district court did not err in refusing to sever the defendants' penalty phase trial.

Likewise, I reject that the district court erred in failing to sever the defendants' penalty phase trial and that failure rose to an Eighth Amendment violation. The majority's discussion finding an Eighth Amendment violation is logically flawed and, at times, difficult to follow. While I disagree with essentially every step of the majority's analysis of this issue, I will briefly state my objections before turning to the harmless error issue, which, in my opinion, is where the majority's nearly nonexistent analysis goes entirely awry.

Initially, the majority points out that Reginald Carr contends the failure to sever violated his Eighth Amendment right to individualized sentencing. Yet the majority recognizes that while the Eighth Amendment requires a jury to make an individualized sentencing determination, it does not mandate separate penalty phase proceedings for each codefendant in death penalty cases. Slip op. at 344 see also *United States v. Tipton*, 90 F.3d 861, 892 (4th Cir. 1996) (joint trials in

death-eligible cases are not per se unconstitutional); *United States v. Rivera*, 363 F. Supp. 2d 814, 823 (E.D. Va. 2005) ("The defendants [in a capital case] have an Eighth Amendment right to an 'individualized determination' of their penalty phase sentence, however, this important right does not compel an individual penalty phase hearing.")

Despite acknowledging that the Eighth Amendment does not compel severance, the majority proceeds to analyze whether the defendants presented "antagonistic" mitigation evidence. Without citing the statute, the majority then seemingly analyzes the penalty phase evidence under the same statutory test it applied to determine whether the trial court abused its discretion in denying severance of the guilt phase.

Not surprisingly, the majority never fully explains how partially antagonistic evidence can result in a violation of the statutory right to sever. Nor does the majority clearly state the basis for its conclusion that the trial court erred in refusing to sever the penalty phase trial. Instead, the majority jumps from a discussion of partially antagonistic evidence to the Eighth Amendment requirement of individualized capital sentencing. But, to the extent the majority relies on the Kansas statutory framework for finding an Eighth Amendment violation, this analysis is flawed. Statutory violations do not equate to constitutional violations. See, *e.g.*, *State v. Sawyer*, 297 Kan. 902, 906-07, 305 P.3d 608 (2013) (noting this court's jurisprudence had "obscured" the analytical distinctions between a statutory argument that a judge is unfairly biased and a constitutional argument that a judge is unfairly biased and analyzing the two bases

separately); *State v. Jones*, 273 Kan. 756, 766, 47 P.3d 783 (2002) (holding a violation of statute requiring a juvenile's parents be notified of a proceeding did not rise to a constitutional violation); *State v. Smallwood*, 264 Kan. 69, 74-75, 955 P.2d 1209 (1998) (analyzing separately defendant's argument that the State violated his statutory right to a speedy trial and his constitutional right to a speedy trial).

The majority also determines some mitigating evidence regarding "moral culpability" was "partially antagonistic," although it appears to recognize that most of the two brothers' mitigating evidence was not antagonistic. I am aware of no authority for the majority's implied conclusion that because there is some antagonistic evidence pertaining to moral culpability, Reginald Carr's death sentence violates the Eighth Amendment's individualized sentencing requirement, and the majority cites none, including the string-cited cases. See slip op. at 348-49.

Similarly, the majority seizes upon a comparatively minor theme suggested by Jonathan Carr's evidence in the penalty phase—*i.e.*, that Reginald Carr led Jonathan Carr astray and that their sister testified Reginald Carr told her he was the shooter. The majority points out that had the brothers received separate penalty phase trials, this mitigating evidence presumably would not have been admitted at Reginald Carr's trial. But once again, I find no support for the majority's implication that because this antagonistic evidence *might* not have been admitted in the penalty phase of a separate trial that its admission in a joint trial somehow rose to the level of a constitutional violation.

More importantly, the majority's unsupported Eighth Amendment analysis relies heavily upon the faulty underlying premise that Reginald Carr's jury did not follow the explicit instruction that "[a]ny evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant." Slip op. at 348. Although the majority declares this case to present the "rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic," it oddly fails to explain the "logic" to which that solid presumption gives way. Slip op. at 348. Unlike the majority, I am not skeptical of this jury ability's to follow instructions simply because of the nature of the case or the "maelstrom that was [the defendants'] family." Slip op. at 348. And not surprisingly, the majority's logic overlooks that this jury had already demonstrated its ability to differentiate between evidence presented by the two brothers when it refused to convict Jonathan Carr on counts related to the Schreiber incident.

Instead, the majority vaguely offers a statement I cannot even loosely characterize as logical: "In view of the defendants' joint upbringing in the maelstrom that was their family and their influence on and interactions with one another, including testimony that tended to show that R. Carr was a corrupting influence on J. Carr, the penalty phase evidence simply was not amenable to orderly separation and analysis." Slip op. at 348.

To summarize, I simply cannot agree with the highly flawed and limited rationale offered by the majority for finding constitutional error in the refusal

to sever the penalty phase trial. I would find no error and affirm Reginald Carr's death penalty conviction.

Assuming joinder error in the penalty phase, the death penalty verdict cannot be attributed to that error.

Even if I agreed with the majority that (1) the district court erred in failing to sever the penalty phase and (2) that error resulted in an Eighth Amendment violation, I would strongly disagree with the majority's conclusory, one-paragraph harmless-error analysis, and I would find that the jury's unanimous decision to render the death penalty was not attributable to any such error. Instead, Reginald Carr's death penalty verdict must be attributed to the overwhelming evidence of extreme terror, humiliation, pain, and anguish inflicted upon the multiple victims. Simply stated, we should not overturn the jury's reasoned decision that this aggravating evidence was not outweighed by mitigating evidence.

Notably, the majority's cursory harmless-error analysis fails to even mention the substantial and compelling evidence of aggravating factors found by the jury. Instead, the majority points to the "especially damning subset [of evidence] that may not have been admitted in a severed proceeding" and the "hopelessly tangled interrelationship of the mitigation cases presented by the defendants" to arrive at its conclusion that the jury simply "could not have discharged its duty to consider only the evidence limited to one defendant as it arrived at their death sentences." Slip op. at 350.

Again, the flaws in this cursory analysis are numerous. Most critically, in its rush to declare that the jury could not have done its job, the majority fails

to do its own job—*i.e.*, to consider whether the court is able to find beyond a reasonable doubt that the error *viewed in the light of the record as a whole*, had little, if any likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances. Slip op. at 349-50 (citing standard of review).

Before considering the record as a whole and the impact it should have had on the majority's analysis, I will first remark upon the "especially damning subset of evidence" referred to by the majority. Slip op. at 350. This evidence has two components. One component is the statement of the defendants' sister, Tamika, that Reginald Carr admitted to her during a jail visit that he was the shooter. When asked about this statement on cross-examination, Tamika said: "I believe I heard him tell me something like that. I don't remember when he asked me who he shot and all that, I don't remember who was, you know, shot by who[m]." The second component is Jonathan's general mitigating evidence suggesting his brother was a negative influence in his life.

The majority refers to this evidence as "moral culpability" evidence and suggests that it was impossible for the jury, after hearing this evidence, to declare mercy for Reginald Carr. Slip op. at 347. In my view, even considering this evidence in isolation, as the majority considers it, the evidence can hardly be characterized as "especially damning." Rather, these evidentiary components were minor in comparison to the substantial and more compelling mitigating evidence both brothers presented about the childhood abuse they suffered at the hands of others, including

parental neglect and being forced to participate in each other's beatings.

But more importantly, this "moral culpability" evidence hardly compelled the jury to overlook everything else they heard about the defendants and their joint 3-hour crime spree, for which the jury had already found them equally legally culpable. Moreover, the negligible impact of Jonathan Carr's mitigating evidence suggesting his brother had been a negative influence in his life is obvious from the jury's refusal to declare mercy and spare Jonathan Carr instead of dealing him the same punishment as his brother. See *People v. Letner*, 50 Cal. 4th 99, 197, 235 P.3d 62 (Cal. 2010) ("Moreover, in light of the circumstance that the jury reached a death verdict as to both defendants, we discern even less of a possibility that the jury improperly assigned culpability based upon one defendant's attempt to mitigate the seriousness of his own actions by shifting accountability to his codefendant.").

In any event, even accepting the majority's characterization of this evidence as "especially damning," I have no hesitation whatsoever in concluding that when viewed in light of the record as a whole it had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances.

Simply put, 12 of Reginald Carr's peers—jurors sworn to uphold the law and impose the death penalty if warranted—heard overwhelming and convincing evidence of heinous and atrocious acts committed by Reginald Carr. And they heard that evidence from Holly, the unintended survivor of this savage attack. It

is nearly impossible to convey in a few short paragraphs the overwhelming nature of that evidence. But in order to demonstrate the severe shortcoming in the majority's harmless error analysis, a summary is necessary.

For more than 3 hours, Reginald and Jonathan Carr inflicted their perverse form of torture on the five victims in this case, forcing their often naked captives to commit sexual acts on one another as the two intruders watched. Holly recounted that over those 3 hours she was raped once by Reginald Carr, who after raping her, grabbed her by the back, turned her around, ejaculated into her mouth, and directed her to swallow. The jury also heard Holly describe how she was twice raped by Jonathan Carr, forced to digitally penetrate herself, and forced into sexual intercourse with Heather, Brad, Aaron, and Jason.

When she was not being violated herself, Holly sat naked in a closet with her fellow captives, so terrified she wet herself, listening to Heather moaning in pain as she repeatedly was raped in the same fashion. Heather's moans caused her boyfriend, Aaron, to break down, sobbing and crying, "[T]his shouldn't happen this way." Holly performed oral sex on Jason while in the closet because one of the two defendants threatened additional violence if the men could not get an erection.

Each victim also was forced to leave the Birchwood residence and travel alone with Reginald Carr to withdraw money from his or her bank accounts. Holly recounted her experience, explaining she was clothed only in a sweatshirt, and that Reginald Carr groped her vagina while they were in the car. Holly asked Reginald if he was going to kill them, and he said "no."

But any slight hope Holly might have had that her life and the lives of her friends would be spared was dashed when they returned to the house and Reginald Carr told Holly, "[D]on't worry. I'm not going to shoot you *yet*." Carr's threat proved true when the five victims were taken at gunpoint into the garage, and Jason, Brad, and Aaron were forced into the trunk of Aaron's car. Jonathan Carr then drove Aaron's car, with Heather seated on the passenger side, while Reginald Carr drove Jason's truck with Holly seated on the passenger side.

The defendants then took their victims to a soccer field in a remote location. They ordered the men out of the trunk and ordered Heather and Holly out of the car. Eventually, Reginald Carr and Jonathan Carr forced each of their five victims, who were naked or partially clothed, to kneel next to each other, single file, on the snow-covered ground in below freezing temperatures. As these victims did so, surely each suspected his or her fate.

Holly testified she heard one shot, then heard Aaron pleading, and then "another shot and another one and another one" as each victim was shot, execution style, in the back of the head. Then everything went briefly gray for Holly. But even after being shot in the back of the head, Holly remained kneeling. One of the defendants kicked her in the back, causing her to fall face forward in the snow. She heard the defendants having a conversation before they drove off in Jason's truck. She felt an impact as the truck ran over her.

After the two men drove off, Holly got up and checked on the others, wrapping her only remaining piece of clothing around Jason's head in a futile

attempt to save his life. And then she ran—terrified, naked, bleeding, and freezing for over a mile to get help. Meanwhile, Reginald and Jonathan Carr, unaware that Holly had survived, returned to the home at Birchwood to steal belongings from the victims and beat Holly's dog to death.

Unquestionably, the State proved by overwhelming and convincing evidence the aggravating circumstance that Reginald Carr committed the murders in a heinous, atrocious, or cruel manner. See K.S.A. 2013 Supp. 21-6624(f). See *State v. Kleypas*, 282 Kan. 560, 569, 147 P.3d 1058 (2006) (murder is committed in an especially heinous, atrocious, or cruel manner for purposes of the death penalty aggravating factor when the victim suffers serious physical abuse or mental anguish before death, and mental anguish includes a victim's uncertainty as to his or her ultimate fate).

Nor can there be any question the State overwhelmingly proved the other three aggravating circumstances found by the jury: (1) Reginald Carr "knowingly or purposely killed or created great risk of death to more than one person." K.S.A. 2013 Supp. 21-6624(b); (2) Reginald Carr committed capital murder so he or another could receive money or items of value. K.S.A. 2013 Supp. 21-6624(c); and (3) Reginald Carr committed capital murder to avoid arrest or prosecution. See K.S.A. 2013 Supp. 21-6624(e).

The majority gives lip service to the standard of review—*i.e.*, to consider whether beyond a reasonable doubt the error *viewed in the light of the record as a whole*, had little, if any likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances. But it

entirely fails to conduct the analysis. Had it done so, I do not believe it could arrive at any conclusion other than that the severance error, if any, had little, if any, likelihood of changing the jury's ultimate conclusion. Instead, the court should hold that this jury, which demonstrated its willingness to independently assess the respective culpability of each defendant, appropriately conducted the required weighing of aggravating and mitigating circumstances and concluded Reginald Carr deserved the penalty of death.

The people of Kansas, through the legislature, enacted a death-penalty scheme that comports with the Eighth Amendment and demonstrates the people's collective belief that death is the appropriate punishment for murder in certain circumstances. I am convinced Reginald Carr received a fair trial and that the jury imposed a sentence of death because it understood that his horrendous crime called for that sentence. Because I would affirm Reginald Carr's death sentence, I dissent.

APPENDIX C

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY,
KANSAS
CRIMINAL DEPARTMENT
DIVISION 9

[Filed November 18, 2002]

Case No. 00 CR 2978

THE STATE OF KANSAS,
Plaintiff,

vs.

REGINALD D. CARR
Defendant,

Case No. 00CR 2979

THE STATE OF KANSAS,
Plaintiff,

vs.

JONATHAN D. CARR
Defendant,

JURY INSTRUCTIONS –
SENTENCING PHASE

APPEARANCES:

For The State:

NOLA FOULSTON
District Attorney
535 No. Main
Wichita, Kansas 67203

KIM PARKER
Chief Deputy District Attorney
535 No. Main
Wichita, Kansas 67203

KEVIN O'CONNOR
Assistant District Attorney
535 No. Main
Wichita, Kansas 67203

For The Defendant (Reginald D. Carr):

E. JAY GREENO
250 N. Water, Suite 215
Wichita, Kansas 67202

JOHN V. WACHTEL, IV
Klenda, Mitchell, Austerman & Zuercher
301 N. Main, Suite 1600
Wichita, Kansas 67202

For The Defendant (Jonathan D. Carr):

RON EVANS
Death Penalty Defense Unit
112 SW 6th, Suite 311
Topeka, Kansas 66603

MARK A. MANNA
Death Penalty Defense Unit
112 SW 6th, Suite 311
Topeka, Kansas 66603

INSTRUCTION NO. 1.

The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.

It is my duty to instruct you in the law that applies to this sentencing proceeding, and it is your duty to consider and follow all of the instructions. You must decide the question of the sentence by applying these instructions to the facts as you find them.

INSTRUCTION NO. 2.

In your determination of sentence, you should consider and weigh everything admitted into evidence during the guilt phase or the penalty phase of this trial that bears on either an aggravating or a mitigating circumstance. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict

should be by any ruling that I have made or anything that I have said or done.

Statements, arguments and remarks of counsel are intended to help you in understanding the evidence and in applying the law to the evidence. If any statements or arguments or remarks are made that are not supported by evidence, they should be disregarded. If any statements are made regarding the law of the case that are not set out in these instructions of law, such statements should be disregarded.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

INSTRUCTION NO. 3.

You must give separate consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him.

Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant.

INSTRUCTION NO. 4.

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist.

In making the determination whether aggravating circumstances exist that outweigh mitigating circumstances found to exist, you should keep in mind

that your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

INSTRUCTION NO. 5.
REGINALD D. CARR, JR.
AGGRAVATING CIRCUMSTANCES

Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences, but which are above or beyond the elements of the crime itself.

As pertains to defendant Reginald D. Carr, Jr., the Plaintiff, State of Kansas, contends that the following aggravating circumstances are shown from the evidence:

1. That the defendant Reginald D. Carr, Jr., knowingly or purposely killed or created a great risk of death to more than one person;

AND/OR

2. That the defendant Reginald D. Carr, Jr., committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value;

AND/OR

3. That the defendant Reginald D. Carr, Jr., committed the crime in order to avoid or prevent a lawful arrest or prosecution;

AND/OR

4. That the defendant Reginald D. Carr, Jr., committed the crime in an especially heinous, atrocious or cruel manner.

   A. "Heinous" means extremely wicked or shockingly evil.

   B. "Atrocious" means outrageously wicked and vile.

   C. "Cruel" means pitiless or designed to inflict a high degree of pain; utter indifference to, or enjoyment of the sufferings of others.

   A crime is committed in an especially heinous, atrocious, or cruel manner where the perpetrator inflicts serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate.

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

INSTRUCTION NO. 6.
REGINALD D. CARR, JR.
MITIGATING CIRCUMSTANCES

Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.

In this proceeding, you may consider sympathy for a defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether

the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

Our State Legislature has provided that mitigating circumstances include, but are not limited to, the following:

1. The defendant has no significant history of prior criminal activity.

   and/or

2. The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.

   and/or

3. The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

   and/or

4. The defendant acted under extreme distress or under the substantial domination of another person.

and/or

5. A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.

and/or

6. The age of the defendant at the time of the crime.

You may further consider as a mitigating circumstance any other factor which you find may serve as a basis for imposing a sentence of less than death. Each of you must consider every mitigating circumstance found to exist.

INSTRUCTION NO. 7.
JONATHAN D. CARR
AGGRAVATING CIRCUMSTANCES

Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences, but which are above or beyond the elements of the crime itself.

As pertains to defendant Jonathan D. Carr, the Plaintiff, State of Kansas, contends that the following aggravating circumstances are shown from the evidence:

1. That the defendant Jonathan D. Carr, knowingly or purposely killed or created a great risk of death to more than one person;

AND/OR

2. That the defendant Jonathan D. Carr, committed the crime for the defendant's self or

another for the purpose of receiving money or any other thing of monetary value;

AND/OR

3. That the defendant Jonathan D. Carr, committed the crime in order to avoid or prevent a lawful arrest or prosecution;

AND/OR

4. That the defendant Jonathan D. Carr, committed the crime in an especially heinous, atrocious or cruel manner.

   a. "Heinous" means extremely wicked or shockingly evil.

   b. "Atrocious" means outrageously wicked and vile.

   c. "Cruel" means pitiless or designed to inflict a high degree of pain; utter indifference to, or enjoyment of the sufferings of others.

A crime is committed in an especially heinous, atrocious, or cruel manner where the perpetrator inflicts serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate.

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

INSTRUCTION NO. 8.
JONATHAN D. CARR
MITIGATING CIRCUMSTANCES

Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.

In this proceeding, you may consider sympathy for a defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

Our State Legislature has provided that mitigating circumstances include, but are not limited to, the following:

1. The defendant has no significant history of prior criminal activity.

   and/or

2. The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.

and/or

3. The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

and/or

4. The defendant acted under extreme distress or under the substantial domination of another person.

and/or

5. A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.

and/or

6. The age of the defendant at the time of the crime.

You may further consider as a mitigating circumstance any other factor which you find may serve as a basis for imposing a sentence of less than death. Each of you must consider every mitigating circumstance found to exist.

INSTRUCTION NO. 9.

At the conclusion of your deliberations, you shall sign the verdict form upon which you agree.

You have been provided verdict forms which provide for three alternative verdicts in each of the four counts of Capital Murder.

These are labeled as follows:

Verdict Form (1)

Verdict Form (2)

Verdict Form (3)

INSTRUCTION NO. 10.

When considering an individual defendant, if you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the particular defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances which you unanimously find beyond a reasonable doubt. That is Verdict Form (1).

If you find that the evidence does not prove any of the claimed aggravating circumstances beyond a reasonable doubt, your presiding juror should mark the appropriate verdict form. That is Verdict Form (2). The court will fix a proper sentence for the particular defendant.

If one or more jurors is not persuaded beyond a reasonable doubt that aggravating circumstances exist or that those found to exist do not outweigh mitigating circumstances, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to

death. That is Verdict Form (3). In that event, the court will fix a proper sentence for the particular defendant.

As concerns the counts other than the first four (Capital Murder), the law gives the court the responsibility to fix a proper sentence for each defendant.

Should the responsibility to fix a proper sentence in all counts – to include the first four (Capital Murder) – fall to me, you rue instructed that the total sentence would be such that the individual defendant would not be eligible to appear before The Parole Board for a certain period of time. The period could be a minimum of 50 years and a maximum of 268 years. It is for the court to decide.

INSTRUCTION NO. 11.

Your Presiding Juror will continue to preside over your deliberations in this proceeding. That person will speak for the jury in Court and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence presented and the law as given to you in these instructions.

Your agreement upon a verdict sentencing a defendant to death must be unanimous.

November 13, 2002 /s/Paul W. Clark
DATE JUDGE PAUL W. CLARK

IN THE SUPREME COURT OF THE UNITED STATES

Jonathan D. Carr Petitioner,	)	
vs.	)	Case No. 14-449
State of Kansas, Respondent.	)	

Motion for Leave to Proceed In Forma Pauperis

Comes Now the ~~Petitioner~~ Resp., Jonathan D. Carr, by counsel undersigned, and moves this Court for leave to proceed in forma pauperis. In support of this motion Petitioner would inform this Court:

1. That he has no funds with which to pay the necessary fees and costs of this action.

2. That he was determined to be an indigent in accordance with K.S.A. 22-4501 *et seq.* and entitled to appointed counsel on appeal on December 16, 2002. On that date the Kansas Capital Appellate Defender Office was appointed to represent him and he was, in accordance with Kansas law, allowed to pursue his direct appeal to the Kansas appellate courts without the payment of docketing fees, attorney fees or any other costs. (See attached order of appointment.) He has remained indigent since that time.

WHEREFORE, your Petitioner prays that his request for leave to proceed in forma pauperis be granted.

Respectfully submitted:

Sarah Ellen Johnson
Kansas Capital Appellate Defender Office
700 Jackson, Suite 903
Topeka, KS 66603
785-368-6587
E-mail: sjohnson@sbids.org
Attorney for Petitioner Jonathan D. Carr

No. 14-449

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS - PETITIONER

VS.

JOHNATHAN D. CARR RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Kansas

---

BRIEF IN OPPOSITION

Counsel for Respondent

Sarah Ellen Johnson* *Counsel of Record*
Kansas Capital Appellate Defender Office
700 Jackson, Suite 903
Topeka, KS 66603
785-368-6587
E-mail: sjohnson@sbids.org

Meryl Carver-Allmond
Kansas Capital Appellate Defender Office

CAPITAL CASE

QUESTIONS PRESENTED

REASONS WHY THE PETITION SHOULD BE DENIED

Question Number I

a. There is no Eighth Amendment controversy in this case. The Kansas Supreme Court's holding is based on the particular provisions of Kansas law, and requires that juries be properly instructed under that law.

b. The decision of the Kansas Supreme Court rests on an independent and adequate state ground: the penalty phase instructions in this case, read together as a whole, misled the jury into believing that, contrary to provisions of state law, the Respondent bore the burden of proving mitigating circumstances beyond a reasonable doubt.

c. Because the decision of the Kansas Supreme Court is based on Kansas law, not the Eighth Amendment, there is no real conflict between this decision and any other decision of any state court of last resort.

d. The error identified by the Kansas Supreme Court in this case is unlikely to occur again, because the required language has been incorporated into the Pattern Instructions for Kansas.

Question Number II

a. The Respondent agrees that there is a split in authority regarding the application of the Confrontation Clause to the penalty phase of a capital trial. However, the Kansas Supreme Court did not make any ultimate determination on that issue in this case. Resolving the legal question would not affect the judgment in this case.

b. In the alternative, this issue was correctly decided.

Question Number III

The decision of the Kansas Supreme Court that the joint penalty phase hearing conducted in this case was so prejudicial to Respondent's Eighth Amendment right to an individualized sentencing hearing that it required reversal, was based on the particular facts of this case, and creates no new rules of law

LIST OF PARTIES

The parties to this case are as stated in the caption, State of Kansas, petitioner, and the Jonathan D. Carr, respondent. In the courts below, petitioner was referred to as appellant-defendant and the respondent was referred to as appellee-plaintiff.

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BRIEF IN OPPOSITION

Respondent, Jonathan D. Carr, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

STATUTES INVOLVED

This is a supplement to the Petitioner's section on Constitutional and Statutory Provisions involved:

K.S.A. § 21-4624 provides in relevant part:

> (c) In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements.

and

> (e) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole.

STATEMENT OF THE CASE

Respondent Jonathan Carr was convicted of capital murder, along with lesser counts. He was sentenced to death by a jury. The Kansas Supreme Court affirmed Respondent's capital murder conviction but reversed his death sentence, finding that the jury was not instructed as they should have been about mitigating circumstances and that his sentencing trial should have been severed from his co-defendant's.

REASONS WHY THE PETITION SHOULD BE DENIED

Question Number I

The Petitioner has failed to identify an issue of federal constitutional law for this Court to address. The Petitioner readily acknowledges that other states have similarly required that their juries be given the instruction at issue, noting that those state courts have looked to their own state statutes in reaching those decisions. Notably, the Petitioner does not quote the specific holding in *State v. Gleason*, 329 P.3d 1102 (Kan. 2014) that it asks this Court to reverse, because in that holding, the Kansas Supreme Court plainly referenced the Kansas statute. Were this Court to grant certiorari to issue an opinion clarifying that the Eighth Amendment does not require the instruction at issue in this case, the outcome for Respondent Carr would remain the same because such a ruling would have no affect on how the Kansas Supreme Court interprets its own statutes.

The Kansas Supreme Court laid out the Eighth Amendment jurisprudence from this Court that requires full effect be given to mitigation evidence. The court went on to note that this Court did not set out specific standards, but rather invited states to set their own standards. The Kansas Supreme Court then considered its own case law history and comparisons to other states before concluding this state's statutory scheme is satisfied by instructing juries as Respondent argued.

The Kansas Supreme Court did not make any novel or outlandish interpretation of federal constitutional law. To the extent that the court made reference to the Eighth Amendment, it was to the basic premise. The Kansas court did not rule that the Eighth Amendment requires all juries be instructed that mitigators need not be proven beyond a reasonable doubt. The Kansas Supreme Court merely ruled that to give proper effect to mitigation (an Eighth Amendment requirement) under the Kansas statutory scheme, Kansas juries must be so instructed, a decision well within that court's discretion.

a. There is no Eighth Amendment controversy in this case. The Kansas Supreme Court's holding is based on the particular provisions of Kansas law, and requires that juries be properly instructed under that law.

Despite the Petitioner's best efforts to convince this Court otherwise, this case does not present an issue of federal constitutional law. As this Court has previously declared, and as the Petitioner acknowledges in its petition, "the states are free to determine the manner in which a jury may consider mitigating evidence." *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). While acknowledging this directive, the Petitioner asks this Court to tell Kansas, "Except for you." This Court specifically invited a split among the states; that a split now exists is as unsurprising as it is unworthy of a grant of certiorari.

The Petitioner argues to this Court that certiorari is appropriate because the Kansas Supreme Court found that the Eighth Amendment requires an affirmative instruction to penalty phase jurors that mitigating circumstances need not be proven beyond a reasonable doubt in order to be weighed against aggravating circumstances. The Kansas court made no such finding and Petitioner misreads the decision in *State v. Gleason*, 329 P.3d 1102 (Kan. 2014)[1] Conspicuously absent from Petitioner's argument is the Kansas Supreme Court's discussion of, and reliance on, the relevant Kansas statute, K.S.A. § 21-4624(e) [now re-codified and in effect as K.S.A. § 21-6617(e)] in the *Gleason* decision.

The Kansas Supreme Court discussed the Eighth Amendment requirement that a sentencer not be precluded from considering relevant mitigating evidence, 329 P.3d at 1147, but did not base its decision on the Eighth Amendment. The court specifically acknowledged this Court's statement in *Walton v. Arizona*, 497 U.S. 639, 649-651(1990) *overruled on other*

[1] The decision in *Gleason* was issued one week before the decisions in Respondent's case and the companion case, *State v. Reginald Carr*, 331 P.3d 544, and featured the main discussion of this issue.

grounds, Ring v. Arizona, 536 U.S. 584 (2002), that the Eighth Amendment does not create any constitutional requirements as to how or whether a capital jury should be instructed on the burden of proof for mitigating circumstances. *Gleason*, 329 P.3d at 1147. The court then focused on the particular requirements of Kansas law, distinguishing the Kansas statute from the statute in question in *Walton*:

> Kansas' capital sentencing statute differs distinctly from the statute at issue in *Walton*, and that distinction is critical to our analysis here. Namely, while K.S.A. 21–4624 requires the State to prove aggravating circumstances beyond a reasonable doubt, the statute is silent as to any burden of proof for mitigating circumstances. K.S.A. 21–4624(e); see also [*Kansas v. Marsh*, 548 U.S. 163, 173 (2006)] (contrasting Kansas' statute, which places no evidentiary burden on capital defendants, with Arizona's statute, which requires capital defendants to prove mitigating circumstances by a preponderance of the evidence).
>
> As the United States Supreme Court recognized, "[t]his distinction operates in favor of Kansas capital defendants." 548 U.S. at 173. Notably, [*State v. Kleypas*, 40 P.3d 139 (Kan. 2001)]' first statement-that any mitigating circumstance instruction must inform the jury that mitigating instructions "need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt," **both preserves the statute's favorable distinction** and protects a capital defendant's Eighth Amendment right to individualized sentencing by ensuring jurors are not precluded from considering all relevant mitigating evidence. *Kleypas*, 40 P.3d at 268.
> ...
> **Because K.S.A. 21–4624 expressly burdens the State with proving the existence of aggravating circumstances beyond a reasonable doubt but places no evidentiary burden regarding the existence of mitigating circumstances on the defendant** beyond the burden of production, we reiterate our holding in *Kleypas* and [*State v. Scott*, 183 P.3d 801 (Kan. 2008)] that capital juries **in Kansas** must be informed that mitigating circumstances need not be proven beyond a reasonable doubt. *Gleason*, 329 P.3d at 1147 (emphasis added).

The Kansas Supreme Court could not have been more clear that the holding in this case relied on its interpretation of a Kansas statute. Given the court's acknowledgment that the Eighth Amendment did not prescribe burdens of proof and that states are left to decide those for themselves, the court could not be misunderstood to base their decision on anything but Kansas law. This Court stated in *Smith v. Phillips*, 455 U.S. 209, 221 (1982), "Federal courts hold no

supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." While the Petitioner would like this Court to focus exclusively on the Kansas Supreme Court's statement that such an instruction "protects a capital defendant's Eighth Amendment right to individualized sentencing," this Court cannot ignore the preceding phrase in that sentence, that this instruction "preserves the statute's favorable distinction." The Court's invocation of the Eighth Amendment was merely to reiterate the basic principle that full consideration must be given to mitigating evidence; the state statute provided the specific law from which the court derived the ultimate conclusion.

Combined with the Kansas Supreme Court's discussion of possible jury confusion with the instructions as given (see Section b below), it is clear the court's decision relies on state law. The decision of the Kansas Supreme Court, which holds that Kansas law requires an affirmative statement regarding the burden of proof, makes no pronouncements regarding federal constitutional requirements, thus presents no questions of federal constitutional dimension and the Petition for a Writ of Certiorari should be denied.

b. The decision of the Kansas Supreme Court rests on an independent and adequate state ground: the penalty phase instructions in this case, read together as a whole, misled the jury into believing that, contrary to provisions of state law, the Respondent bore the burden of proving mitigating circumstances beyond a reasonable doubt.

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). If the same judgment would be rendered by the state court after this Court corrects its views of federal law, the review would amount to nothing more than advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117,

125–126 (1945). "When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Coleman*, 501 U.S. at 730.

The decision of the Kansas Supreme Court in this case was based on the former K.S.A. § 21-4624(e). The court determined that there was a reasonable probability that the instructions in this case, considered as a whole, misled the jury as to the burden of proof regarding mitigating circumstances under Kansas law, resulting in a misapplication of that statute. Therefore, the decision of the Kansas Supreme Court in this case would be the same, regardless of its view of the requirements of the Eighth Amendment.

This Court has held that the individual states have a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Individual states are free to allocate a burden of proof to the defendant to prove mitigating circumstances, as long as the prosecution continues to bear the burden of proving every element of the offense charged or the aggravating circumstances. *Walton*, 497 U.S. at 650. The Kansas law in effect at the time of Respondent's trial required that the prosecution prove aggravating circumstances beyond a reasonable doubt, but imposed no such requirement on the defendant, with regard to mitigating circumstances:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole. K.S.A. § 21-4624(e).

As previously noted, this Court has recognized:

> "...the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate; it places no additional evidentiary burden on the capital

> defendant. This distinction operates in favor of Kansas capital defendants." *Marsh*, 548 U.S. at 173 (2006).

An instruction to penalty phase jurors that they must find that the defendant had proved a mitigating circumstance beyond a reasonable doubt before weighing it against any aggravating circumstances would be contrary to Kansas law. Likewise, potentially reversible error would occur if the instructions, when read as a whole, could mislead the jurors into that conclusion. The Kansas Supreme Court found that occurred in this case, and that finding is well-supported by the record.

The instruction addressing mitigation did not state that mitigating circumstances need not be proven beyond a reasonable doubt, even though this trial occurred years after the *Kleypas* Court called for that instruction. In contrast, the beyond a reasonable doubt burden of proof was stated many times, often in conjunction with the consideration of mitigating circumstances. While those instructions did not say mitigating circumstances had to be proven beyond a reasonable doubt, they repeatedly put the jury into the mindset of considering what had been proven beyond a reasonable doubt when considering mitigating circumstances.

The court found that because the only burden mentioned was the "beyond a reasonable doubt" burden, the jurors may not have understood that they could consider any mitigation that they found existed, even if not proved beyond a reasonable doubt. *Gleason*, 329 P.3d at 1148. Although the court noted that instructions that prevent jurors from giving meaningful effect or a reasoned moral response to mitigating evidence implicate a defendant's right to individualized sentencing under the Eighth Amendment, those same instructions would likewise prevent jurors from following the provisions of state law as expressed in K.S.A. 21-4624(e).

The Kansas Supreme Court will not reverse a case based on instructional error if the instructions properly and fairly state the law as applied to the facts of the case and if they could

not reasonably have misled the jury. *State v. Scott*, 183 P.3d 801, 810, Syl. ¶ 32 (Kan. 2008). Reversal in this case was founded on the court's view that the instructions as a whole created a substantial probability that reasonable jurors could have believed that they were required to find the existence of a mitigating circumstance beyond a reasonable doubt in order to consider it in the weighing process. Whether or not this is contrary to the Eighth Amendment, it is contrary to the Kansas statutory provisions for the consideration and weighing of aggravating circumstances against mitigating circumstances. Kansas law provides the basis of the court's decision. As this Court has established, Kansas has broad discretion, within certain Constitutional parameters, to decide how to instruct juries on aggravators and mitigators. The Kansas Supreme Court did nothing more than exercise this discretion by considering the total effect of the jury instructions given in this case. This Court defers to the decisions of state courts on issues of state law, *Bush v. Gore*, 531 U.S. 98, 112 (2000), and should deny the Petition for a Writ of Certiorari in this case.

c. Because the decision of the Kansas Supreme Court is based on Kansas law, not the Eighth Amendment, there is no real conflict between this decision and any other decision of any state court of last resort.

As stated in the preceding arguments, the decision rendered in this case is a decision based on the particular provisions of Kansas law. Thus Kansas is not in conflict with any other jurisdiction, whether that jurisdiction is interpreting its own state law or the United States Constitution.

The states were invited by this Court to establish different standards for the consideration of mitigating evidence. The Petitioner's recitation of different state court's decisions, therefore, does not demonstrate a split of authority on a point of federal law for this Court to address. Rather, it demonstrates that the states are doing exactly what this Court expected.

The Petitioner first claims conflict with the Supreme Court of California, citing *People v. Souza*, 277 P.3d 118, 156-157 (Cal. 2012). Even if one could read into the Kansas Supreme Court's decision a pronouncement that the Eighth Amendment requires an affirmative instruction on the burden of proof, the California cases cited in the Petitioner's brief do not engage in any Eighth Amendment analysis regarding instructions on the burden of proof. *Souza* rejected the defendant's Eighth Amendment burden of proof claim stating the instruction sought would have been duplicative, citing *People v. Avila*, 208 P.3d 634, 670 (Cal. 2009), as modified (Aug. 12, 2009). In *Avila*, the court rejected the claim without analysis, citing *People v. Samayoa*, 938 P.2d 2, 47 (Cal. 1997) *as modified on denial of reh'g* (Aug. 13, 1997). In *Samayoa*, the court rejected the claim without analysis, citing *People v. Breaux*, 821 P.2d 585, 604-605 (Cal. 1991). In *Breaux*, the court did not consider the burden of proof claim. The issue presented in *Breaux* was whether the trial court should have affirmatively instructed the jurors that they were not required to unanimously find a mitigating circumstance in order to consider it. *Id.* Additionally, the California court was interpreting capital sentencing statutes that were substantially different from those of Kansas. Unlike the Kansas statute in question, the California statutes do not require that aggravating circumstances be found beyond a reasonable doubt and neither the defense nor the prosecution carries a burden of proof during the penalty phase. *People v. Welch*, 976 P.2d 754, 797 (Cal. 1999). While the California court in *Welch* did conclude that the jury in that case would not have mistakenly inferred that one jury instruction stating that aggravators must be proved beyond a reasonable doubt could also mean that standard applied to mitigating factors, it hardly gives rise to a split of authority on a point of federal constitutional law that the Kansas court reached a different conclusion when considering a different set of instructions.

The issue in *Dawson v. State*, 637 A.2d 57 (Del. 1994) was not whether the Eighth Amendment requires that the jury receive an affirmative instruction regarding the burden of proof for mitigating circumstances. Rather, the question before the court was whether the instructions in that case were unconstitutionally ambiguous. *Id.* at 64. Additionally, the death penalty statute in question in *Dawson* is different from the Kansas statute as it requires the prosecution to convince the sentencer that aggravating circumstances found to exist outweigh the mitigating circumstances "by a preponderance of the evidence." *Id.* at 63.

There was no Eighth Amendment claim or analysis in the Indiana case cited by the Petitioner, *Matheney v. State*, 688 N.E.2d 883 (Ind. 1997). And the case concerned a significantly different statute. Under the Indiana statute, mitigating circumstances must be proven by a preponderance of the evidence, and the court found that an instruction to that effect would have been appropriate. *Id.* at 902. However, because there was nothing in the *Matheney* jury instructions that would have led the jury "to a misunderstanding" regarding the burden of proof, there was no error in failing to give the instruction. *Id.*

State v. Jones, 474 So. 2d 919, 932 (La. 1985) did not address the Eighth Amendment, presumably because there was no Eighth Amendment claim. The defendant merely requested an instruction that the jury need find mitigating circumstances only by "any substantial evidence" or by a "preponderance of the evidence."

Similarly, in *Green v. State*, 934 S.W.2d 92 (Tex.Crim.App. 1996), there was no discussion of the Eighth Amendment, because the defendant did not claim, in that case, that the Eighth Amendment required an affirmative instruction to the jury that mitigation need not be proved beyond a reasonable doubt. In fact, the defendant raised no claim (constitutional or not) that an affirmative instruction was required. Rather, the defendant claimed that the instructions

might have misled the jurors into believing "that a death sentence was appropriate unless the State proved "beyond a reasonable doubt" that a life sentence was appropriate in view of Appellant's mitigating circumstances." *Id.* at 107.

The fundamental problem with the Petitioner's effort to establish a split of authority, though, is that this Court invited the states to reach different conclusions on this point of law. The Kansas Supreme Court has not departed from other jurisdictions on point of federal constitutional law, but rather on a matter this Court explicitly left to the States' individual discretion. Kansas simply requires greater clarity in its jury instructions based on the requirements of a Kansas statute than other states require based on their own, different statutes. Because there is no true conflict on a point of federal law between the decision of the Kansas Supreme Court and that of any other jurisdiction, this Court should deny the Petition for a Writ of Certiorari.

d. The error identified by the Kansas Supreme Court in this case is unlikely to occur again, because the required language has been incorporated into the Pattern Instructions for Kansas.

The Kansas Supreme Court first held in *State v. Kleypas*, 40 P.3d 139, 268 (Kan. 2001) *overruled on other grounds, State v. Marsh*,102 P.3d 445 (Kan. 2004), that in a capital sentencing proceeding, "... any instruction dealing with the consideration of mitigating circumstances should state (1) they need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt and (2) mitigating circumstances do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision." Soon afterwards, Kansas' pattern instruction on mitigating circumstances was amended to clarify that jurors need not be unanimous on

mitigating circumstances, but failed to include the language that mitigating circumstances need not be proven beyond a reasonable doubt. *Gleason*, 329 P.3d at 1145. Since that time, the PIK instruction on mitigating circumstances, PIK Crim. 4th 54.050, has incorporated both of *Kleypas*' recommended statements and correctly instructs the jury that "[m]itigating circumstances need not be proved beyond a reasonable doubt." *Gleason*, 329 P.3d at 1146. Because the pattern instruction now contains the correct language under the *Kleypas* decision, this issue is unlikely to arise in the future, and the Petition for a Writ of Certiorari should be denied.

Question Number II

a. The Respondent agrees that there is a split in authority regarding the application of the Confrontation Clause to the penalty phase of a capital trial. However, the Kansas Supreme Court did not make any ultimate determination on that issue in this case. Resolving the legal question would not affect the judgment in this case.

The second question presented is whether this Court's ruling in *Crawford v. Washington*, 541 U.S. 36 (2004) applies in the penalty phase of a capital trial to bar the admission of testimonial hearsay against the defendant, unless he or she has had a previous opportunity to cross-examine the declarant. The Kansas Supreme Court answered that question in the affirmative. *State v. Reginald Carr*, 331 P.3d at 723-724[2] However, on the record before it, the court made no findings with regard to the questioned evidence in this case, whether the admission of the questioned evidence actually violated *Crawford*, or whether, if so, the error in the admission of the evidence required reversal. In the main opinion of Respondent's co-defendant, the court merely held:

---

[2] The decision in Respondent's co-defendant's case is the main decision for both cases. Unless otherwise specified, the decision in Reginald Carr's case applies equally to Respondent and is the decision cited for discussion purposes.

> At any repeat penalty phase hearing on remand, we caution the parties and the district judge that Kansas now holds that the Sixth Amendment applies in the proceeding and that out-of-court testimonial hearsay may not be placed before the jury without a prior opportunity for the defendant to cross-examine the declarant. This includes any testimonial hearsay referenced in questions posed by counsel.

R. Carr, 331 P.3d at 724.

That brief comment was reiterated in Respondent's own decision, again with no discussion of the actual comments Respondent objected to. The Confrontation Clause issue played no role in the determination of the case. The court's judgment reversing the Respondent's sentence of death was not based on the admission of testimonial hearsay in the penalty phase. Thus, should this Court grant certiorari on this issue and find that the Kansas Supreme Court erred in its determination, the outcome of the case will be the same, because that determination played no part in the ultimate judgment.

As previously stated, if the same judgment would be rendered by the state court after this Court corrects its views of federal law, the review would amount to nothing more than an advisory opinion. *Herb v. Pitcairn*, 324 U.S. at 125–126; *Coleman v. Thompson*, 501 U.S. at 730. For those reasons, this Court should deny the Petition for a Writ of Certiorari.

b. In the alternative, this issue was correctly decided.

Under the Confrontation Clause, a testimonial statement of a declarant who does not testify at trial is inadmissible unless the declarant is unavailable and the defendant had a previous opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 59, 68. However, K.S.A. § 21-4624 (c), which was in effect at the time of Respondent's trial, allows the admission of hearsay during the penalty phase of a capital trial:

> In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. **Any such evidence which the court deems to have probative value may be received regardless of**

> **its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements.**

(emphasis added).

The application of K.S.A. 21-4624(c) in this case resulted in the admission of a great deal of prejudicial hearsay. Much of it was the prototypical type of testimonial hearsay described in *Davis v. Washington*, 547 U.S. 813 (2006), statements made in response to police questioning, contained in police reports and/or reports, prepared for the purpose of prosecution.

The Petitioner correctly notes that there is disagreement among jurisdictions regarding the application of *Crawford* to the penalty phase of a capital trial. The decision of the Kansas Supreme Court is in harmony with this Court's pronouncements in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) that facts which increase the defendant's sentence beyond the sentence authorized by the conviction must be found by the jury beyond a reasonable doubt, in the same manner as the facts necessary for a conviction.

If aggravating circumstances must be proved in the same manner as the elements of a crime, at the very least, the protection of *Crawford* extends to the evidence used by the prosecution to prove those circumstances. This was the holding of *United States v. Jordan*, 357 F Supp. 2d 889, 903-904 (E.D. Va. 2005)("Consistent with the constitutional safeguards identified by the United States Supreme Court, as interpreted by the Fourth Circuit, this Court is of the opinion that with respect to the eligibility phase of the penalty stage of a capital trial, the Confrontation Clause is equally applicable."). However, that court declined to extend the protections of *Crawford* to the selection phase. *Id.*

In this case, the prosecution did not rely on any testimonial hearsay to prove aggravating circumstances, instead using it to challenge evidence of mitigating circumstances, so *Jordan* does not completely address the issue raised by the use of testimonial hearsay against the

Respondent. In *United State v. Mills*, 446 F.Supp.2d 1115 (C. D. Cal. 2006), the court held *Crawford* applicable to both the eligibility and selection stages of the penalty phase. The *Mills* court agreed with the *Jordan* court that *Crawford* applied at the eligibility phase, but did not agree that constitutional safeguards could be relaxed in the selection phase. "[T]his call to admit more evidence does not sanction the admission of unconstitutional evidence against the defendant... while the Court recognizes the policy reasons encouraging the admission of the maximum quantum of evidence during the selection phase, that policy is insufficient to override Defendants' right to confront witnesses during such a critical portion of the capital trial." *Mills*, 446 F.Supp.2d at 1130. This reasoning was accepted by the court in *United States v. Concepcion Sablan*, 555 F.Supp.2d 1205, 1218 -1222 (D. Colo. 2007), in which the court found that testimonial hearsay would not be admitted during the penalty portion of the defendant's trial.

The *Mills* court was addressing additional statutory and non-statutory aggravating factors in its decision. In this case, the prosecution was using testimonial hearsay to counter the Respondent's mitigation evidence. *Mills* did not decide whether the determination of mitigating factors or the weighing portions of the penalty phase required the application of *Crawford*. *Mills*, 446 F.Supp.2d 1134-1135. At least one court has found that testimonial hearsay may be used to rebut the defendant's mitigation: *State v. McGill*, 140 P.3d 930, 941-942 (Ariz. 2006). However, *McGill* relies primarily on *Williams v. New York*, 337 U.S. 241 (1949), in which this Court found the defendant's right to confront witnesses does not apply to sentencing proceedings. *Williams*, of course, was decided more than 50 years before *Crawford*, *Apprendi* and *Ring*.

This Court's holding in *Crawford* should be extended to all portions of the penalty phase of a capital trial. In death penalty proceedings, the Eighth Amendment requires that fact-finding

procedures aspire to a heightened standard of reliability, *Ford v. Wainwright*, 477 U.S. 399, 411, (1986), particularly "in the determination [of] whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72 (1987). It would be completely contrary to these principles to find that testimonial hearsay could be introduced, as in this case, to counter mitigation evidence or persuade the sentencer to assign the mitigation little or no weight, when such evidence would not be admissible in a shoplifting prosecution.

This Court should find that the right to confrontation extends to the state's presentation of evidence at a capital sentencing trial. In Respondent's case, the disputed statements were relevant to an aggravating factor. As one of the aggravating factors, the state alleged that the crimes were committed in a heinous, atrocious, or cruel manner. To dispute that aggravating factor, as well as to present evidence in mitigation, the defense presented the testimony of Dr. Preston who testified that Respondent suffered from brain damage. Dr. Pay's testimony, offered in rebuttal, disputed Dr. Preston's conclusion of brain damage. The hearsay statements by Dr. Pay's colleagues also disputed the conclusion. (Record on Appeal volume 75, pp.65-66) Whether Respondent suffered from brain damage went to the state's claim that he committed the crimes in a heinous, atrocious, or cruel manner. While it was offered in the defense's mitigation case, it did work to challenge the state's assertion that the crimes were committed in a heinous, atrocious, or cruel manner. When the state presents evidence, even evidence that rebuts defense evidence, it is impossible to find that the evidence does not serve to meet the state's burden of proving the elements the state must prove beyond a reasonable doubt. In a guilt phase trial, the state would not be permitted to produce testimonial statements to rebut a defendant's alibi evidence without providing an opportunity for cross-examination. Though that evidence was

intended to directly rebut defense evidence, it cannot be denied that the evidence would ultimately work to prove the defendant's guilt, not just disprove his alibi.

The prosecution's use of testimonial hearsay in this case was used to challenge the Respondent's evidence designed to create reasonable doubt on an aggravating circumstance. Thus, the evidence went to the state's effort to prove an aggravating circumstance. Respondent had the right to confront the witnesses used for those purposes. Because this issue was correctly decided, the Petition for a Writ of Certiorari should be denied.

Question Number III

The decision of the Kansas Supreme Court that the joint penalty phase hearing conducted in this case was so prejudicial to Respondent's Eighth Amendment right to an individualized sentencing hearing that it required reversal, was based on the particular facts of this case, and creates no new rules of law.

The Petitioner has claimed that the decision of the Kansas Supreme Court that Respondent's Eighth Amendment rights to an individualized capital sentencing determination were violated by the trial court's failure to sever the penalty phase of his trial from that of his co-defendant has created a *per se* rule against joinder in capital trials. To the contrary, the court acknowledged that the Eighth Amendment does **not** mandate separate penalty proceedings for co-defendants in capital trials: "The Eighth Amendment to the United States Constitution requires the jury to make an individualized sentencing determination. It does not categorically mandate separate penalty phase proceedings for each codefendant in a death penalty case." *R. Carr*, 331 P.3d at 717-718. The ruling is clearly based on the particular facts of this case. Petitioner is actually seeking a ruling from this Court that would render unreviewable any

decision by a state trial court to conduct a joint penalty hearing for co-defendants in a capital trial.

Kansas law allows the trial court to sever the trials of co-defendants:"When two or more defendants are jointly charged with any crime, the court may order a separate trial for any one defendant..." K.S.A. § 22-3204. Severance should be granted when it appears necessary to avoid prejudice and ensure a fair trial to each defendant. *State v. Davis*, 83 P.3d 182 (Kan. 2004). See also, *Zafiro v. United States*, 506 U.S. 534, 538-539 (1993)(severance required when there is a serious risk that a joint trial will compromise a specific trial right of one of the defendants). This Court has stated that "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 562 U.S. 511, 516 (1960).

The Eighth Amendment requires an individualized sentencing determination in a death penalty case. *Stringer v. Black*, 503 U.S. 222, 230 (1992). "[T]he sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Lockett v. Ohio*, 438 U.S. 586, 601 (1978)(citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The defendant has a constitutional right to an individualized determination of his culpability. *Zant v. Stephens*, 462 U.S. 862, 879 (1983)("What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.").

The decision of the Kansas Supreme Court does not mandate separate penalty phases in all capital cases. The court's ruling applies to this case alone, and is based on its finding that by being tied to his co-defendant's courtroom behavior and by the prosecution's arguments inextricably linking the two defendants as one unit, Respondent did not receive the

individualized sentencing determination to which he was entitled. This case posed a unique challenge for the Kansas courts in protecting that right to individualized determination at sentencing. Quite simply, this case was the most notorious murder case in Kansas since the Clutter family murders made famous by Truman Capote. The co-defendants in this case are brothers who are colloquially referred to throughout the state as "The Carr Brothers." Long before a jury was chosen in this case, the very real danger existed that the two co-defendants would not be judged as individuals, but would be lumped together as one entity.

The Petitioner erroneously claims that the Kansas Supreme Court set forth no independent reasons for finding that Respondent was prejudiced by the failure to sever because much of the court's rationale was articulated in the companion case and focused on mitigating evidence put forth by Respondent to show his co-defendant was more culpable. This is incorrect, as the Petitioner's own petition demonstrates. The court pointed to two bases for determining Respondent, like his brother, was prejudiced by a joint penalty trial, the very two arguments raised by Respondent in his brief to that court. *State v. Jonathan Carr*, 329 P.3d 1195, 1212 (2014). Respondent was prejudiced by having his sentencing fate tied to Reginald's in a joint penalty phase. On the opening morning of the penalty phase, the parties, outside of the presence of the jury, discussed the sheriff's requirements for security for the two defendants now that they had both been convicted. (Record on Appeal volume 67, pp.4-7). The district court first spoke with Respondent's defense counsel about Respondent wearing leg irons in the court room. The court noted that Respondent had not engaged in any disruptive behavior in the courtroom that would lead anyone to believe he was a security risk at all. (ROA. 67, p.5). The court also made certain to arrange boxes in the court room in such a way that the jury would be unable to see the leg irons on Respondent.

The discussion then turned to the co-defendant, Reginald. Reginald was not just in leg irons, but was also in handcuffs. The extra precaution was necessary against Reginald because he had told detention officers he was wanting to fight. (ROA. 104, p.91). According to one sargeant, Reginald warned the guards, "I'm also going to make all of you earn your money from here on out." (ROA. 104, p.93). For the penalty phase, he had been provided a sweater to cover the handcuffs so they would not be visible to the jury, but he refused to use the sweater. (ROA. 67, p.7). The district court informed Reginald's defense counsel that Reginald was inviting any prejudice he might suffer should the jury see the handcuffs. (ROA. 67, p.7). The district court, though, did not seem to consider that Respondent would not have invited that prejudice.

In closing arguments at the penalty phase, the state actively encouraged the jury to consider Jonathan and Reginald's common traits, instead of viewing them as the separate individuals the Eighth and Fourteenth Amendment requires a jury to consider.

> These defendants share a lot of things in common. They have somewhat of a common family history, although they were separated at times. Separated for a good period of time when Reginald Carr was in prison. They have the same eye color. They are now both wearing glasses, although their mother said that Reginald doesn't need them. They share some DNA. They share intelligence. They also share immediate self gratification. That they want something and they want it now. And they also share choices. (ROA.75, p.142).

In the prosecutor's initial closing argument, she did not distinguish between Reginald and Respondent. (ROA. 75, pp.128-145). Instead, there were constant references to "they," "Jonathan and Reginald," and "the two defendants." The prosecution went so far as to link Respondent to Reginald's diagnosis of antisocial personality disorder. (ROA.75, pp.186-187).

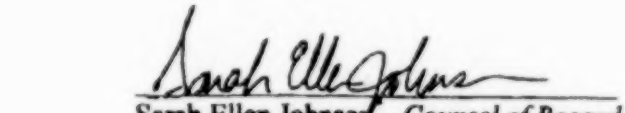
Rather than expound on the matter, the court simply accepted the prejudice and harm arguments made by Respondent. Doing so without setting out a lengthy explanation of its own is not grounds for a grant of certiorari. To the extent that the nuances of Respondent's particular

claims were not clearly addressed separately from his co-defendant's claims, that only further demonstrates that Respondent has still not truly been recognized as his own individual, separate from his brother. The Kansas Supreme Court made a sound, fact-based decision that in this particular case, trying the two defendants together prejudiced Respondent. The Petition for Certiorari should be denied.

CONCLUSION

For all these reasons, the Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,



Sarah Ellen Johnson *Counsel of Record*
Kansas Capital Appellate Defender Office
700 Jackson, Suite 903
Topeka, KS 66603
785-368-6587
E-mail: sjohnson@sbids.org

Meryl Carver-Allmond
Kansas Capital Appellate Defender Office

Counsel of Record

No. 14-449

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF FOR PETITIONER

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. McALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
Memorial Hall, 2nd Floor
120 S.W. 10th Ave.
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com
Counsel for Petitioner

February 2015

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

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CONSTITUTION

U.S. Const. amend. VIII *passim*

REPLY BRIEF

This case involves three important constitutional issues and affects two-thirds of the criminal defendants sentenced to death in Kansas. Respondent Jonathan Carr, however, argues that this Court should deny review for three reasons, none of which withstand scrutiny: (1) the Kansas Supreme Court's decision requiring the jury to be affirmatively instructed that the mitigating circumstances need not be proven beyond a reasonable doubt was a matter of state law and is an error unlikely to occur again; (2) although there is a split of authority on whether the Confrontation Clause applies in the selection phase of capital sentencing proceedings, the issue does not control disposition of this case and the Kansas Supreme Court was correct in holding that the Clause does apply; and (3) the Kansas Supreme Court created no new law when it held the Eighth Amendment required severance here.

Respondent's reasoning is wrong on all three claims. First, the Kansas Supreme Court unquestionably decided the jury instruction issue on Eighth Amendment grounds, adding to a split of authority. Second, that court's holding on the Confrontation Clause applies to all future Kansas capital prosecutions and adds to an existing split of authority, a split that includes a currently pending petition for writ of certiorari from the Fourth Circuit, *Umana v. United States*, No. 14-602 (response from the United States due February 27, 2015). Third, the Kansas court's severance holding, based squarely on the Eighth Amendment, broke new ground and departs from federal precedent.

The Court should grant review of all three questions presented in the State's petition.

I. THE KANSAS SUPREME COURT'S DECISION REGARDING THE JURY INSTRUCTIONS ON MITIGATING CIRCUMSTANCES RESTED SOLELY ON EIGHTH AMENDMENT GROUNDS.

A. The Kansas Supreme Court's Decision Explicitly Rested on Eighth Amendment Grounds.

Respondent incorrectly argues that the Kansas Supreme Court's decision in *Kansas v. Gleason* (petition pending, No. 14-452), and thus in this case, rested on State law grounds. This misreading is refuted by that court's *Gleason* opinion:

> The district court's instruction on mitigating circumstances failed to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt. And the penalty-phase instructions as a whole exacerbated the error because they referred only to the beyond-a-reasonable-doubt burden of proof. Under these circumstances, we conclude a reasonable likelihood exists that the jury applied the mitigating circumstances instruction in a manner precluding individual jurors from properly considering relevant mitigating evidence *as required by the Eighth Amendment*. Consequently, we vacate Gleason's death sentence and remand for resentencing.

State v. Gleason, 329 P.3d 1102, 1148 (2014) (emphasis added).

Prior to reaching this conclusion, the court held:

> Notably, Kleypas' first statement-that any mitigating circumstance instruction must inform the jury that mitigating instructions "need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt," both preserves the statute's favorable distinction and protects a capital defendant's *Eighth Amendment right* to individualized sentencing by ensuring jurors are not precluded from considering all relevant mitigating evidence. [Citation omitted.]

Id. at 1147 (emphasis added).

Then, in this case, the court referenced its holding in Reginald Carr's case, which reiterated that the court found an Eighth Amendment violation:

> In Kansas, a district judge must instruct a penalty phase jury in a capital case not only that it need not be unanimous on the existence of a mitigating circumstance but also that a mitigating circumstance need not be proved beyond a reasonable doubt. See *State v. Gleason*, No. 97,296, 299 Kan. ——, —— – ——, 329 P.3d 1102 (filed July 18, 2014) (slip op. at 82–86) (discussing *Scott*, 286 Kan. at 106–07, 183 P.3d 801; *Kleypas*, 272 Kan. at 1078, 40 P.3d 139); see also K.S.A. 21–4624 (State expressly burdened with proving existence of aggravating circumstance beyond reasonable doubt; statute silent on standard of proof on mitigating circumstance). When nothing in the instructions mentions any burden other than "beyond a

> reasonable doubt," jurors may be "prevented from giving meaningful effect or a reasoned moral response to" mitigating evidence, implicating a defendant's right to individualized sentencing *under the Eighth Amendment*. *Gleason*, 299 Kan. at ——, 329 P.3d 1102 (slip op. at 85) (citing *Scott*, 286 Kan. at 107, 183 P.3d 801). This is unacceptable.
>
> Were we not already vacating R. Carr's death sentence on Count 2 and remanding the case because of Judge Clark's failure to sever the penalty phase, error on this issue would have forced us to do so. See *Gleason*, 299 Kan. at ——, 329 P.3d 1102 (slip op. at 85). In any new penalty phase on remand, the district judge must ensure that jurors understand that mitigating circumstances need not be proved beyond a reasonable doubt.

State v. Carr, 331 P.3d 544, 732-33 (2014) (emphasis added); *State v. Carr*, 329 P.3d 1195, 1213 (2014) (adopting the court's analysis in the Reginald Carr opinion). There is simply no question that the court's decision below rested on the Eighth Amendment.

B. The Kansas Supreme Court's Decision Does Not Rest On An Independent And Adequate State Ground.

Contrary to respondent's misguided contention that there are independent and adequate state grounds to sustain the Kansas Supreme Court's decision, Opp. 5-11, the lower court's decision rests *solely and exclusively* on *federal* constitutional grounds. At best, respondent can wishfully assert that the Kansas

Supreme Court might have been able to rely on *potential* state grounds. But the fact that state law arguments *could potentially be made if* this Court reverses on the federal constitutional issue and remands the case does not demonstrate in any way that the decision the State is asking this Court to review rests on an independent and adequate state law ground. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). There simply is no plausible claim that the Kansas Supreme Court decided this issue on the basis of an independent and adequate state law ground. See *Florida v. Meyers*, 466 U.S. 380, 381 n.a1 (1984).

C. Review Also Is Warranted Because Of The Decision's Severe Impact On Existing Kansas Death Sentences.

Respondent invites this Court to decline review because the issue allegedly is not likely to arise in future Kansas capital prosecutions. This argument ignores, however, the fact that the decision below will invalidate the death sentences of six of the nine defendants currently on death row in Kansas.

Moreover, a number of states, including California, Delaware, Indiana, Louisiana, and Texas, have affirmatively held the jury is not required to be instructed that mitigating circumstances need not be proven beyond a reasonable doubt. The Kansas Supreme Court's decision, which rests on Eighth Amendment grounds, calls these courts' holdings into question. To avoid this unnecessary contribution to a "crazy quilt" of federal death penalty jurisprudence, review is warranted. *See Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring) ("Turning a blind eye to federal constitutional error ..., allowing it

to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt.")

II. THE KANSAS SUPREME COURT'S CONFRONTATION CLAUSE HOLDING ADDS TO AN EXISTING SPLIT OF AUTHORITY AND IS THE LAW IN KANSAS GOING FORWARD.

Although respondent acknowledges a split of authority on the Confrontation Clause issue, he nonetheless urges this Court to deny review because the issue is not determinative in this case (given that the court below found other "errors" that required reversal of his sentence). But the Kansas Supreme Court explicitly recognized the split of authority on this question and chose a side, *i.e.*, it reached a legal conclusion as a matter of federal constitutional law. That holding will apply to *all* Kansas capital cases now pending and brought in the future, and it is an important question that warrants this Court's review.

As respondent concedes, here the State used hearsay evidence during the selection phase to contest Jonathan's proposed mitigating circumstances. (The State relied on the guilt-phase trial evidence, all of which was subject to full confrontation, to establish aggravating circumstances.) The relaxed evidentiary rules in the selection phase permitted Jonathan to admit hearsay evidence to support his mitigating circumstances. These relaxed rules benefit both parties and should not be used as both a shield and a sword for the defendant. Because Jonathan had and used the opportunity to present hearsay evidence in support of his mitigating circumstances, the State should have the

same opportunity to rebut his presentation with evidence in kind.

Deciding whether a death sentence is appropriate is an unquestionably important decision. The Court long ago held that, in reaching this decision, the jury should have access to *all* relevant information, including hearsay evidence. *Williams v. New York*, 337 U.S. 241 (1949).

Here, the State is only requesting a rule of "parity," not any sort of unfair advantage. If Jonathan Carr can use hearsay evidence to support his mitigating circumstances, the State should be permitted to use hearsay evidence to rebut and counter his evidence. To that end, the principle here is strikingly similar to the rule the Court recently and unanimously reiterated in *Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013), that the State must be permitted to introduce rebuttal expert testimony to counter a defendant's introduction of expert testimony on mental status.

In any event, the Kansas Supreme Court plainly ruled on the question, there is a demonstrated split of authority, and the issue warrants this Court's review.

III. THE EIGHTH AMENDMENT DOES NOT REQUIRE SEVERANCE BASED ON THE JURY'S ABILITY TO CONSIDER MERCY.

As explained in the State's petition for a writ of certiorari, the Kansas Supreme Court effectively announced a *per se* rule holding (1) the Eighth Amendment requires severance during the sentencing proceedings in death penalty cases (2) because the Eighth Amendment also requires the jury to consider "mercy" in determining the moral culpability of each co-

defendant. Never has this Court endorsed such a *per se* rule requiring severance, nor has this Court ever endorsed the Kansas Supreme Court's rationale for the rule, *i.e.*, that the Eighth Amendment requires juries to consider *mercy* in determining whether a death sentence is appropriate. Thus, the Kansas Supreme Court created new death penalty law, effectively creating splits of authority on these questions, and its decision warrants this Court's review.

On the merits, any prejudice to Jonathan as a result of having his sentence considered along with Reginald's is far from obvious. To support its conclusion regarding Jonathan, the Kansas Supreme Court opined as follows:

> Did the district judge err in refusing to sever the penalty phase of defendants' trial? A majority of six members of the court answers this question yes for reasons explained in Section P1 of the R. Carr opinion and because of the family circumstances argument raised by J. Carr. The majority also relies on the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase.

State v. Carr, 329 P.3d 1195, 1212 (2014).

But the handcuffs *on Reginald* were not prejudicial to Jonathan's mitigation strategy of proving his brother was the more culpable actor. Nor in his brief in opposition does Jonathan point to any other "facts" that show prejudice to him. He cites no facts regarding "family circumstances" because there were none, and he did not even argue any such facts to the Kansas Supreme Court. The most he does is allege prejudice

supposedly suffered from the prosecutor's closing statements regarding both brothers' common history and traits. Thus, contrary to respondent's assertions, the court's opinion on the need for severance with respect to Jonathan was neither sound, nor based on facts in the record.

*****

Ultimately, this Court should grant review on the three important and unresolved questions presented in the Kansas petition for a writ of certiorari. The best the respondent can do is invite the Court to completely misread the Kansas Supreme Court's decision and allow federal death penalty jurisprudence to develop in a crazy quilt fashion.

CONCLUSION

For the reasons set forth in both Kansas's petition for a writ of certiorari and this reply, Kansas requests that the Court grant plenary review of all three questions presented.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. McALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
Memorial Hall, 2nd Floor
120 S.W. 10th Ave.
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioner

February 2015

Nos. 14-449, 14-450

In the Supreme Court of the United States

KANSAS,

Petitioner,

v.

JONATHAN D. CARR,

Respondent.

KANSAS,

Petitioner,

v.

REGINALD DEXTER CARR, JR.,

Respondent.

On Writs of Certiorari to the Supreme Court of Kansas

JOINT APPENDIX VOL. 1

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
Counsel of Record
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com
Counsel for Petitioner
Kansas

SARAH E. JOHNSON
Counsel of Record
KANSAS APPELLATE DEFENDER OFFICE
700 Jackson, Suite 903
Topeka, KS 66603
(785) 368-6587
sjohnson@sbids.org
Counsel for Respondent
Jonathan D. Carr

NEAL KUMAR KATYAL
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
Counsel for Respondent
Reginald Dexter Carr, Jr.

Petitions for Writ of Certiorari filed October 16, 2014
Petitions for Writ of Certiorari granted March 30, 2015

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Relevant Docket Entries in the Eighteenth Judicial District, District Court, Sedgwick County, Kansas, *The State of Kansas v. Jonathan D. Carr*, No. 00 CR 2979 JA 13

Relevant Docket Entries in the Supreme Court of Kansas, *The State of Kansas v. Jonathan D. Carr*, No. 90198 JA 18

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Transcript of Jury Trial Volume 46, Eighteenth Judicial District, District Court, Sedgwick County, Kansas, Nos. 00 CR 2978 and 00 CR 2979 (11/13/2002) JA 356
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Verdict Forms Reginald D. Carr, Jr., Eighteenth Judicial District, District Court, Sedgwick County, Kansas, No. 00 CR 2978, (11/14/2002) JA 461

Verdict Forms Jonathan D. Carr, Eighteenth Judicial District, District Court, Sedgwick County, Kansas, No. 00 CR 2979, (11/14/2002) JA 477

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendices to the Petitions for a Writ of Certiorari:

Kansas v. Reginald Dexter Carr, Jr.

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Appendix A Opinion of the Supreme Court of Kansas (July 25, 2014) App. 1

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Appendix B Opinion of the Supreme Court of Kansas in *State of Kansas v. Reginald Dexter Carr, Jr.* (No. 90,044)
(continued from Volume 1)
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Appendix C Jury Instructions Sentencing Phase in the Eighteenth Judicial District, District Court, Sedgwick County, Kansas, Criminal Department Division 9
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RELEVANT DOCKET ENTRIES

Eighteenth Judicial District, District Court, Sedgwick County, Kansas

No. 00 CR 2978

The State of Kansas v. Reginald D. Carr, Jr.

	DATE	CDE	DESCRIPTION
		* * *	
002	121800	CI	COMPLAINT/INFORMATION
		* * *	
023	010401	ACI	AMENDED COMPLAINT/ INFORMATION
		* * *	
228 229	022301	MOT	DEFT-OBJ TO JOINDER CASES FOR PRELIM, MOT TO SEPARATE CASES 03-02-01 AT 09:30 DIV 20
230	042001	MMO	MSR: OVERRULED 04-06-01 DIV 20 OWENS, CLARK
		* * *	
236 237 238 239	022301	RSP	DEFT REGINALD DEXTER CARR, JR'S OBJECTION TO JOINDER OF CASES FOR PRELIMINARY EXAMINATION, MOTION TO SEPARATE CASES FOR

	DATE	CDE	DESCRIPTION
			PURPOSES OF PRELIMINARY EXAMINATION & NOTICE OF INTENT TO FILE MOTION FOR SEVERANCE PURSUANT TO K.S.A. 2-2304
			* * *
500 501	062101	MOT	DEFT-MOT TO HEAR SEVERANCE MOT IN CAMERA & ALLOW W/O FACTUL 06-29-01 AT 09:30 DIV 20
502	092601	ODR	MSR: WITHDRAWN 09-21-01 DIV 09 CLARK, PAUL W.
			* * *
678 679 680	111901	MOT	DEFT-MOTION TO SEVER COUNTS IN COMPLAINT/ INFORMATION AND TO 11-30-01 AT 09:00 DIV 09 MSR: OVERRULED 01-10-02 DIV 09 CLARK, PAUL W.
			* * *
734 735 736	011702	NOT	NOTICE OF AGGRAVATING CIRCUMSTANCES FILED BY NOLA FOULSTON, DISTRICT ATTY/ REC'D 1-17-02 9:04 A.M. BY JUDGE PAUL W CLARK DIV 9

	DATE	CDE	DESCRIPTION
		* * *	
781 782 783	011102	M	STATE'S RESPONSE TO DEFT'S MOTION TO SEVER COUNTS IN COMPLAINT/ INFORMATION AND ORDER SEPARATE TRIALS FILED BY KIM T PARKER, ASST DA
		* * *	
871	032202	MOT	DEFT-MOTION TO SEVER TRIAL FROM THAT OF THE CODEFENDANT
872	050602	MMO	MSR: OVERRULED 04-23-02 DIV 09 CLARK, PAUL W.
873 874	032202	M	DEFT'S MEMORANDUM IN SUPPORT OF HIS MOTION/COPY PROVIDED TO STATE (FILED UNDER SEAL)
		* * *	
876 877	032202	M	DEFT'S SUPPLEMENT TO HIS MEMORANDUM IN SUPPORT OF HIS MOTION COPY NOT PROVIDED TO STATE/ SUBMITTED TO COURT UNDER SEAL
		* * *	

	DATE	CDE	DESCRIPTION
934 935	041102	ODR	ORDER RE: MOTION TO SEPARATE CASES FOR PURPOSES OF PRELIM EXAM (4-19-01) OVERRULED S/C OWENS II
* * *			
052	053002	ODR	ORDER RE: SEVERANCE OF TRIAL (4-22-02) OVERRULED S/PW CLARK
* * *			
083 084 085	053002	ODR	ORDER RE: DEFT'S MOTION TO SEVER COUNTS IN COMPLAINT/INFORMATION & TO ORDER SEPARATE TRIALS (1 10 02) OVERRULED S/PW CLARK
* * *			
562	111802	IN	DEFT'S PROPOSED JURY INSTRUCTIONS FILED BY JOHN VAL WACHTEL
563	111802	IN	INSTRUCTIONS BEFORE EVIDENCE GIVEN BY JUDGE CLARK
564	111802	JIN	INSTRUCTIONS GIVEN BY JUDGE PAUL W CLARK
* * *			

	DATE	CDE	DESCRIPTION
568	111802	VER	VERDICT GUILT PHASE S/W BRILEY, PRESIDING JUROR
569	111802	JIN	JURY INSTRUCTIONS - SENTENCING PHASE S/PW CLARK
570	111802	VER	VERDICT SENTENCING PHASE S/W BRILEY, PRESIDING JUROR
571 572 573 574	111502	JEJ	JOURNAL ENTRY OF JUDGMENT (11-15-02) DEATH SENTENCES (4) ALL CONSECUTIVE PLUS LIFE IMPRISONMENT - HARD 20, PLUS 570 MONTHS/ JAIL TIME CREDIT 702 DAYS/ DEFT PAY COSTS & DFBF/ SHF TRANSPORT DEFT TO SECY OF CORRECTIONS S/PW CLARK
* * *			
576 577 578	112502	NAP	NOTICE OF APPEAL, IN FORMA PAUPERIS, DEFT APPEALS FROM HIS CONVICTION, JUDGMENT, SENTENCE, INCLUDING ALL ADVERSE RULINGS COMMITTED TO THE SUPREME COURT, FILED

	DATE	CDE	DESCRIPTION
			BY JOHN VAL WACHTEL
* * *			

RELEVANT DOCKET ENTRIES

Kansas Supreme Court

No. 90044

State of Kansas v. Reginald Dexter. Carr, Jr.

Date	Description
	* * *
25-JUL-14	PUBLISHED OPINION / 421 pages - $105.25
25-JUL-14	JUDGMENT DOCKETED- OPINION FILED / Affirmed in part,reversed in part,sentence of death vacated &remanded-Per Curiam
15-JUL-14	RULE 6.09(B) LETTER / REGINALD DEXTER CARR JR
03-JAN-14	ORDER BY THE COURT / Noted-Response to motion to supplment oral argument-Carr
03-JAN-14	ORDER GRANTING MOTION / to supplement oral argument
26-DEC-13	RESPONSE- / Motion to Supplement Oral Argument - REGINALD DEXTER CARR JR
20-DEC-13	MEMO MOTION / Motion to Supplement Oral Argument State of Kansas
04-DEC-13	MEMO NOTATION / 6.09(b) Letter - REGINALD DEXTER CARR JR

27-NOV-13	ORDER - GRANTING MOTION / to file Notice of Additional Case Aurthority that excceds 350 words - Carr
14-NOV-13	MEMO MOTION / Permission to File S.C. Rule 6.09 (b) Exceeding 350 Words - Reginald D.Carr Jr.
07-OCT-13	AMENDED BRIEF / Resp to Aple 2nd Sup Brf REGINALD DEXTER CARR JR
03-OCT-13	SUPPLEMENTAL BRIEF / (Resp to Aplt's 3rd Supp Brf) State
03-OCT-13	ORD GRANTING MOT TO FILE BRIEF INSTANTER / (Reply br to Aplnt's 3rd Supp Br) - State of Kansas
02-OCT-13	MOTION TO FILE BRIEF INSTANTER / STATE
02-OCT-13	MEMO NOTATION / Response to 3rd Sup Brf HOLD - (OOT) - STATE
* * *	
30-SEP-13	SUPPLEMENTAL BRIEF / Response to Aple 2nd Supp Brf REGINALD DEXTER CARR JR
16-SEP-13	SUPPLEMENTAL BRIEF / STATE OF KANSAS
12-SEP-13	SUPPLEMENTAL BRIEF / REGINALD DEXTER CARR JR
01-JUL-13	ORDER CONTINUED / Due 10/1/2013 Parties responses to supplemental brief - 10 page limit. No exts.

01-JUL-13	ORDER BY THE COURT / Due 9/16/2013 Parties supplemental brief - 20 page limit. No exts.
01-JUL-13	CAUSE SCHEDULED FOR HEARING / Set for hearing 12/17/2013 @ 9:00 a.m. (60 mins)
25-MAR-13	SUPPLEMENTAL BRIEF / State
17-MAR-13	RECORD RECEIVED CLERK, DISTRICT COURT / 204 Vols (14 Boxes for a total of 226 items) SEDGWICK COUNTY
* * *	
20-FEB-13	SUPPLEMENTAL BRIEF / REGINALD DEXTER CARR JR - Aple Supp Brf Due 03/25/2013
* * *	
22-JAN-13	ORDER CONTINUED / Granted & Noted-Motion to file response OOT to motion to re-open briefing
22-JAN-13	ORDER - GRANTING MOTION / to re-open briefing. Aplt supp br due 2/21/2013, limit 5 pgs.Aple supp br 5 pgs
07-JAN-13	MEMO NOTATION / Response To Motion To Re-Open Briefing (HOLD) File (Permission) - STATE
07-JAN-13	MEMO MOTION / File Response OOT (Re: Re-Open Briefing) STATE OF KANSAS

21-DEC-12	MEMO MOTION / Motion To Re-Open Briefing - REGINALD DEXTER CARR JR
17-DEC-12	REPLY BRIEF / REGINALD DEXTER CARR JR
01-OCT-12	BRIEF RECEIVED / Vol I & II - State
13-SEP-12	ORDER - GRANTING MOTION / to file brief in excess of 100 pgs. Appellee brief not to exceed 385 pgs - STATE
07-SEP-12	MEMO MOTION / for Aple Brf to Exceed 100 pages - State
16-DEC-11	MEMO ORDER / Due 10/1/2012 Br-State of Kansas, final ext. Any reply br due 12/17/2012.
06-DEC-11	MEMO ORDER / 12/14/2011 @ 9:15 a.m. telephone status conference with counsel
24-OCT-11	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / Due 1/9/2012 Br-State of Kansas
11-OCT-11	MOT. FOR EXT. OF TIME TO FILE BRIEF / 8th Motion - State of Kansas
* * *	
16-OCT-09	SUPPLEMENTAL BRIEF / REGINALD DEXTER CARR JR APLE BRF DUE 01/14/2010
* * *	

17-AUG-09	MEMO MOTION / TO FILE SUPP BRIEF REGINALD DEXTER CARR JR
	* * *
11-MAY-09	BRIEF RECEIVED / & VOL II OF BRF W/APPX (3 BOOKS) REGINALD DEXTER CARR JR-APLE BRF DUE 08/12/2009
07-MAY-09	MEMO ORDER- GRANTING MOTION / TO FILE BRIEF IN EXCESS OF 100 PAGES (410 PGS) NOTED-RESP & REPLY
	* * *
04-MAY-09	RESPONSE- / TO MTN TO EXCEED 100 PAGE BRF - STATE
23-APR-09	MEMO MOTION / TO FILE BRIEF IN EXCESS OF 100 PAGES REGINALD DEXTER CARR JR
19-MAR-09	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 5/11/2009 BR-REGINALD CARR
09-FEB-09	MOT. FOR EXT. OF TIME TO FILE BRIEF / 23RD MOTION REGINALD DEXTER CARR JR
	* * *
20-MAY-03	MEMO NOTATION / DUE 08/18/2003 BRIEF OF APPELLANT
	* * *
21-JAN-03	ORDER APPOINTING COUNSEL

21-JAN-03	JOURNAL ENTRY / REGINALD DEXTER CARR JR
21-JAN-03	NOTICE OF APPEAL FILED / REGINALD DEXTER CARR JR
21-JAN-03	DOCKETING STATEMENT / REGINALD DEXTER CARR JR
21-JAN-03	ORD. GRANTING MOT. TO DOCKET OUT OF TIME / BY REGINALD DEXTER CARR, JR.
	* * *
08-JAN-03	MOTION TO DOCKET APPEAL OUT OF TIME / REGINALD DEXTER CARR JR

RELEVANT DOCKET ENTRIES

Eighteenth Judicial District, District Court, Sedgwick County, Kansas

No. 00 CR 2979

The State of Kansas v. Jonathan D. Carr

	DATE	CDE	DESCRIPTION
		* * *	
002	121800	CI	COMPLAINT/INFORMATION
		* * *	
044	010401	ACI	AMENDED COMPLAINT/ INFORMATION
		* * *	
181 182	041701	NOT	NOTICE OF INTENT TO REQUEST SEPARATE SENTENCING PROCEEDING FILED BY NOLA FOULSTON
		* * *	
356 357 358	011702	NOT	NOTICE OF AGGRAVATING CIRCUMSTANCES FILED BY NOLA FOULSTON, DISTRICT ATTORNEY/ REC'D 1-17-02 @ 9:05 A.M., BY JUDGE PAUL W CLARK DIV 09
		* * *	

	DATE	CDE	DESCRIPTION
513 514	041102	ORD	ORDER RE: MOTION TO SEPARATE CASES FOR PURPOSES OF PRELIM EXAM (4-19-01) OVERRULED S/C OWENS II
		* * *	
585	053002	ODR	ORDER RE: SEVERANCE OF TRIAL (4-22-02) OVERRULED S/PW CLARK
		* * *	
613 614	053002	ODR	ORDER RE: MOTION TO SEVER COUNTS IN COMPLAINT/INFORMATION & TO ORDER SEPARATE TRIALS (1 10 02) OVERRULED S/PW CLARK
		* * *	
670 671	062602	ODR	ORDER FOR TRANSCRIPT MOTION TO SEVERE CONDUCTED ON 4-23-02 S/PW CLARK
		* * *	
682 683	072602	IN	PROPOSED JURY INSTRUCTIONS FILED BY MARK MANNA, DEATH PENALTY DEFENSE UNIT (ACCUSED FILING #51)

	DATE	CDE	DESCRIPTION
* * *			
685 686	073002	MOT	DEFT-2ND MOTION FOR SEVERANCE (ACCUSED FILING #56) 08-09-02 AT 08:45 DIV 09
687 688	091702	MMO	MSR: OVERRULED 08-09-02 DIV 09 CLARK, PAUL W XXX
689 690	080802	M	RESPONSE TO DEFT'S MOTION TO SEVER TRIAL FILED BY KIM PARKER DEP DA
* * *			
987 988	092502	ODR	ORDER RE: DEFT'S 2ND MOTION FOR SEVERANCE (8-9-02) OVERRULED S/PW CLARK
* * *			
042 043	111802	IN	DEFT'S PROPOSED JURY INSTRUCTIONS FOR SECOND PHASE FILED BY RON EVANS, DEATH PENALTY DEFENSE UNIT
044	111802	IN	INSTRUCTIONS BEFORE EVIDENCE GIVEN BY JUDGE PAUL W CLARK

	DATE	CDE	DESCRIPTION
045	111802	JIN	INSTRUCTIONS BY JUDGE PAUL W CLARK
		* * *	
049	111802	VER	VERDICT GUILT PHASE S/W BRILEY, PRESIDING JUROR
050	111802	JIN	JURY INSTRUCTIONS - SENTENCING PHASE S/PW CLARK
051	111802	VER	VERDICT SENTENCING PHASE S/W BRILEY, PRESIDING JUROR
052 053 054 055 056	111502	JEJ	JOURNAL ENTRY OF JUDGMENT (11-15-02) TTL PERIOD OF CONFINEMENT- DEATH SENTENCES (4) ALL CONSECUTIVE PLUS LIFE IMPRISONMENT - HARD 20, PLUS 492 MONTHS/ JAIL TIME CREDIT 702 DAYS/ DEFT PAY COSTS & DFBF/ SHF TRANSPORT DEFT TO SECY OF CORRECTIONS S/PW CLARK
		* * *	
059 060 061	112102	NAP	NOTICE OF APPEAL, DEFT APPEALS FROM ANY AND ALL ADVERSE RULINGS OF

	DATE	CDE	DESCRIPTION
			THE TRIAL COURT TO THE SUPREME COURT OF KANSAS, FILED BY RONALD EVANS
* * *			

RELEVANT DOCKET ENTRIES

Kansas Supreme Court

No. 90198

State of Kansas v. Jonathan D. Carr

Date	Description
* * *	
25-JUL-14	PUBLISHED OPINION / 57 pages - $14.25
25-JUL-14	JUDGMENT DOCKETED- OPINION FILED / Affirmed in part,reversed in part,sentence of death vacated,&remanded-Per Curiam
03-JAN-14	ORDER GRANTING MOTION / to supplement oral argument by State of Kansas
20-DEC-13	MEMO MOTION / Motion to Supplement Oral Argument State of Kansas
02-DEC-13	RULE 6.09(B) LETTER / JONATHAN D CARR
03-OCT-13	SUPPLEMENTAL BRIEF / (Resp to Aplt's 2nd Supp Brf) - State
03-OCT-13	ORD GRANTING MOT TO FILE BRIEF INSTANTER / (Reply Br to Aplnt's 2nd Supp Br) - State of Kansas
02-OCT-13	MOTION TO FILE BRIEF INSTANTER / STATE OF KANSAS

02-OCT-13	MEMO NOTATION / Response to 2nd Sup. Brf HOLD - (OOT) - STATE
01-OCT-13	SUPPLEMENTAL BRIEF / (Response to Aple Supplemental Brief) - JONATHAN D CARR
16-SEP-13	SUPPLEMENTAL BRIEF / STATE OF KANSAS
13-SEP-13	SUPPLEMENTAL BRIEF / JONATHAN D CARR
* * *	
01-JUL-13	ORDER CONTINUED / Due 10/1/2013 Parties responses to supplemental brief - 10 page limit. No exts.
01-JUL-13	ORDER BY THE COURT / Parties supplemental brief due 9/16/2013 20 page limt. No exts.
01-JUL-13	CAUSE SCHEDULED FOR HEARING / Set for hearing 12/17/2013 @ 1:30 p.m. (60 mins)
22-AUG-12	RECORD RECEIVED CLERK, DISTRICT COURT / 225 VOLUMES (16 BOXES), SEDGWICK COUNTY
04-JUN-12	REPLY BRIEF / JONATHAN D CARR
02-MAY-12	MEMO ORDER-DENYING MOTION / to file supplemental brief on present showing - Jonathan Carr
02-APR-12	BRIEF RECEIVED / State
20-MAR-12	MEMO ORDER- GRANTING MOTION / to file Aple brief in excess of 100

	pages. State's brief not to exceed 359 pgs.
15-MAR-12	MEMO MOTION / Permission To File Death-Penalty Brief In Excess Of 100 Pages - STATE OF KANSAS
13-MAR-12	MEMO MOTION / To File Supplemental Brief JONATHAN D CARR
16-DEC-11	MEMO ORDER / Due 4/2/2012 BR-State of Kansas, Final ext. Any reply brief due 6/4/2012
06-DEC-11	MEMO ORDER / 12/14/2011 @ 9:00 a.m. telephone status conference with counsel
24-OCT-11	ORD. GRANTING EXT. OF TIME. TO FILE BRF / Due 1/9/2012 Br-State of Kansas
12-OCT-11	MOT. FOR EOT TO FILE BRIEF (OUT OF TIME) / 9th Motion State of Kansas
* * *	
03-SEP-09	SUPPLEMENTAL BRIEF / JONATHAN D CARR
03-SEP-09	MEMO ORDER- GRANTING MOTION / TO FILE SUPP BRIEF - JONATHAN CARR. SUPP BR DUE 10/19/09. NOT TO EXCEED 20 PGS.
26-AUG-09	MEMO NOTATION / APLT SUPP BRF HOLD (PERMISSION) JONATHAN D CARR

18-AUG-09	MEMO MOTION / TO FILE SUPP BRIEF - JONATHAN CARR
15-JUL-09	BRIEF RECEIVED / 2 VOLS JONATHAN D CARR APLE BRF DUE 10/16/2009
06-JUL-09	MEMO ORDER- GRANTING MOTION / TO EXCEED BRF PG LIMITATIONS-JONATHAN CARR. APLT BRF NOT TO EXCEED 400 PGS.
01-JUL-09	MEMO MOTION / TO EXCEED BRF PG LIMITATIONS JONATHAN D CARR
08-JUN-09	ORD. GRANTING EXT. OF TIME. TO FILE BRF / DUE 7/15/09 BR JONATHAN CARR. FINAL EXT.
21-MAY-09	MOT. FOR EXT. OF TIME TO FILE BRIEF / 20TH MOTION - JONATHAN D CARR
* * *	
19-MAY-03	MEMO NOTATION / DUE 08/18/2003 BRIEF OF APPELLANT
* * *	
21-FEB-03	NOTICE OF APPEAL FILED / JONATHAN D CARR
21-FEB-03	DOCKETING STATEMENT / JONATHAN D CARR

21-FEB-03	ORD. GRANTING MOT. TO DOCKET OUT OF TIME / BY JONATHAN D. CARR
10-FEB-03	MOTION TO DOCKET APPEAL OUT OF TIME / JONATHAN D CARR

IN THE EIGHTEENTH JUDICIAL DISTRICT DISTRICT COURT, SEDGWICK COUNTY, KANSAS CRIMINAL DEPARTMENT

Case No. 00 CR 2978
00 CR 2979

[Dated April 23, 2002]

STATE OF KANSAS, Plaintiff,	)
vs.	)
REGINALD DEXTER CARR, JR. and JONATHAN D. CARR, Defendants.	)

MOTIONS HEARING

PROCEEDINGS had and entered of record on April 23, 2002, before the Honorable Paul Buchanan, Judge of Division 15, Eighteenth Judicial District, Sedgwick County, Kansas.

APPEARANCES:

For the Plaintiff:
Nola Foulston
Kim Parker
District Attorneys Office
535 North Main
Wichita, Kansas 67203

For Defendant
Jonathan D. Carr:
Ron Evans
Mark A. Manna
Death Penalty Defense Unit
112 SW 6th Street - Suite 211
Topeka, Kansas 66611

For Defendant
Reginald Carr, Jr:
John V Wachtel
Klenda, Mitchell, Austerman
301 North Main
Wichita, Kansas 67203

For Defendant
Reginald Carr, Jr:
E. Jay Greeno
Attorney at Law
250 North Water - Suite 215
Wichita, Kansas 67202

For KWCH, Wichita
Eagle and KAKE:
William P Tretbar
Lyndon W. Vix
Fleeson, Gooing, Coulson
125 North Market Suite 1600
Wichita, Kansas 67202

SHARON WILLIAMS, CSR, RPR

* * *

[p.50]

Mr. Evans in how the Court should consider that. I don't think the state of Kansas is entitled to know what our theory of defense is at this point in time. It's our theory of the defense and even if they don't agree with it, it's still our theory of the defense. It's the evidence that we believe that we're going to present in this particular case and it's going to be antagonistic to the evidence of Jonathan Carr. Whether they would like to know what it is and have an opportunity to rebut it, this is not the place for that. The place to rebut our defense is at the jury trial in this particular matter. I would ask the Court to consider it but please do not release that to the prosecution. Thank you.

THE COURT: Thank you. Mr. Evans.

MR. EVANS: Your Honor, I think the motion speaks for itself and I'll join most of what Mr. Greeno said in support of severance. Judge, there is no way if this case proceeds the way it is now with these brothers being tried together that I cannot prosecute Reginald Carr. That's true in the first stage, but it's absolutely true in the second stage. The

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legislature saw fit to pass a statutory mitigator talking about roles in the offense providing that it is a statutory mitigator in the state of Kansas whether -- if the defendant played a relatively minor role in the offense.

We're going to have to get into roles of the offense if this case gets to the second stage. There is no way I cannot -- As Jonathan's advocate, as much as I might not want to hurt his brother, there is no way as Jonathan's advocate I can't get into Reginald's prison record, why was he sent to prison, was he accused of any violent attacks while he was in prison. There is no way I can't put relatives on the stand to talk about Reginald versus Jonathan, who was the leader, who seemed to follow who around. We're going to get in -- There is no way that I cannot at least try to get into that. You can try to stop me, but the second stage, with the state of affairs in Kansas, I don't think that -- I think that would certainly be reversed if we were prevented from getting into things like that. So, I have to be Reginald's prosecutor. That adds another prosecutor in the room. There is no way that

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that doesn't prejudice Reginald.

Now, I say it from this standpoint because I know what I'm going to do to Reginald, and I'll bet a month's pay that Mr. Greeno and Mr. Wachtel are going to be doing the same thing to Jonathan, so, I mean, that is certainly going to prejudice Jonathan's right to a fair trial. They're -- We're going to get into things on Reginald that there's no way the State would get to introduce into evidence against him if he was sitting there by himself. I mean, there's no way the State would get into his prison record. It's not a violent conviction he was sent to prison for. There's no way they would get in

his prison record, record in prison. That doesn't go to any of the statutory aggravators.

There's no way that they would get into talking to the grandmother of these young men about who did what and how that -- how that affected the other defendant but for the fact that they were joined in this trial. So, there are all sorts of things that there's going -- that you're going to have to address and I don't know how you address them. I don't know how you let us have our bite of the apple without

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creating reversible error for Reginald Carr and vice versa, so I think severance is absolutely necessary on that ground alone. We've set out some other grounds. I'll answer any questions the Court has.

THE COURT: I have none at this time.

MR. EVANS: I have nothing further.

THE COURT: For the State.

MS. FOULSTON: Thank you, Your Honor. Again, it's a day of reflection, Your Honor, when you listen to the arguments of counsel, not only counsel for the media that were here but also counsel for the defense, for Mr. Jonathan Carr and for Reginald Carr, and it makes the State stand back and say what is the most important thing that we can do in this case to preserve and protect the rights of the victims, the state of Kansas and preserving and protecting the rights of these defendants. In the event that this case results -- does result in a

conviction, I want to assure that this has been done in the most constitutional and fair manner, looking at all of the things that are necessary components, to assure that there is a fair trial for both defendants in this case and

* * *

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let's do rebuttal and then I'll ask everybody to respond to the question. The question is going to be let's say, just for the sake of argument, that Mr. Reginald Carr is being tried by himself. Could you put on Ms. Adams and give her full testimony to show the whole transaction, not for the truth of the matter stated but simply what happened to the coat, to the white car, what happened to these two people? That's going to be the two questions I'm going to ask of everybody.

MS. FOULSTON: Your Honor, in that Tronda Adams testimony there are about three statements that are placed in there by counsel. There is no Bruton problem or issue with her, what she visualized, what she saw, what her mother saw, the way the defendant was clothed. None of those flow to the Bruton issues. They're a statement that's made, three statements that are quoted by counsel. These three statements in and of themselves, when I reviewed the file and the transcript I thought well, I can accommodate you. I don't need -- At the expense of severing these trials, I can carve my testimony and instruct a witness to

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leave out those statements so we avoid Bruton problems. So, if that's what's the problem is, I can take care of that so you don't need to sever, because I can do that and get a full and complete testimony in my belief. Yeah, I'd like to have that information in but not at the expense of a Bruton issue.

THE COURT: The question I'm going to ask is could you, though, in a single trial with Mr. Reginald Carr present that evidence as part of what's sometimes called loosely res gestae but show the overall transaction?

MS. FOULSTON: Not if there's an objection as to -- It could be within the res gestae, Your Honor. Yes, it could be presented.

THE COURT: Think about that. I'm going to ask everybody that question on their rebuttal. Do you have rebuttal, Mr. Wachtel? I'm sorry. Mr. Wachtel --

MR. WACHTEL: I'm remaining silent, Your Honor. Thank you.

THE COURT: Excuse me. Mr. Greeno, do you have rebuttal?

MR. GREENO: Yes, I do. Miss Foulston may not want to elicit those statements from

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Tronda Adams, but I am sure Mr. Evans is going to want to in his trial because they are -- they exculpate Mr. Jonathan Carr.

A couple things come to mind. I know that Mr. Gessler did that. They had two juries in that trial and there's the affidavit that he spoke about. I don't know how they do that in California. I really do not know how they do that. That was the first time I ever heard of it. But the things that come to mind is that we are dealing with a statute, Kansas death penalty, that is in its infancy. We've had one Kansas Supreme Court case come down in an opinion and I know of no statutory authority for having -- trying codefendants with two juries in one trial. I would be -- We would not be doing ourselves, the defendants, the victims, the states of Kansas any benefit in this case if we try a case that is going to get reversed on a technical basis, because there's no statutory authority for it and no guidance from any of the appellate courts for the Court in this particular case.

On a more practical level, if I was a juror in one of these cases, I can see where I

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would be very troubled when I was asked to leave the courtroom because some amount of evidence was going to be coming in. And I don't know what the Court -- how the Court would explain that, but if I was a juror and I was asked to leave during the course of a trial and I knew the other jury was not going to be asked to leave, I would be very concerned about what evidence would be coming in and how I'm supposed to make any judgment. And I know -- I've talked about this earlier - the Court would instruct them that what's going on in here is none of your business or not for your consideration

or not for your concern, but I think as human beings we do that. The logistics of it concerns me. I think that we're going to have jurors that are going to be upset because they're going to be leaving the courtroom. It's going to be like musical chairs in here.

Those are just a few of the things that I can think of along with the other -- I don't know if there's any Bruton problems that we may encounter in this particular case. You know, I just don't think that -- I think we're taking some very dangerous steps if we start

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taking steps nobody else has taken before in the state of Kansas and -- because we don't know how it's going to affect these trials or how the trials are going to take place. I would just say, you know, we need to stick with what we've done before and what the law has addressed.

If the Court feels there's a basis and I believe there is certainly a basis - for the severance of these trials, the Court needs to sever them and they need to get two trials. If there's a problem with the pretrial publicity, there's a problem with the pretrial publicity and that can be dealt with in voir dire or a motion for change of venue or however that takes place. But I think given the state of the law in the state of Kansas if we start trying to implement radical and new procedures that haven't been approved by the Kansas Supreme Court we may well be getting in trouble. Thank you.

THE COURT: Thank you. Mr. Evans.

MR. EVANS: Your Honor, I usually need a little bit of time to cogitate on things. Perhaps that speaks to my intelligence, but this was dropped on us here in the last 20 minutes.

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I'm not sure what Miss Foulston is proposing. I get the concept of two juries. I can get my head around that, but how would we pick those two juries. Would they both -- so, Mr. -- So, they would give an opening statement to both juries and then the first -- the Reginald jury would file out and then Jay Greeno or Val Wachtel would give their opening and then Jonathan's jury would come in. I don't know.

I've got a lot of questions. I don't -- I'm not opposed to this. I mean, I appreciate counsel conceding, as she appears to concede, that a severance or some sort of prophylactic measure is needed in this case. I certainly welcome that concession and I don't want to reject two juries just out of hand, but perhaps if Miss Foulston and Miss Parker could give a written proposal and give us a few days at least to look at it. I can't say that it's not to Jonathan's advantage. I certainly don't think it's to his advantage to just reject it out of hand.

So, I guess what I would like to see is something in writing as to exactly what they are proposing and how it would work from the

* * *

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STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

CERTIFICATE

I, Sharon M. Williams, a Certified Shorthand Reporter, under and by virtue of the laws of the State of Kansas, and a regularly appointed, qualified and acting official reporter of the Eighteenth Judicial District of the State of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings in Case No. 00 CR 2978 and 00 CR 2979, heard on April 23, 2002.

That thereafter, upon written order by the attorneys for the Defendants, I personally prepared the foregoing transcript, by means of computer-aided transcription, and that said transcript is a true and correct copy of my shorthand notes, all to the best of my knowledge and ability.

SIGNED, OFFICIALLY SEALED, and DELIVERED this 4th day of March, 2003.

_____
Sharon M. Williams, CSR, RPR

SHARON WILLIAMS, CSR, RPR

IN THE EIGHTEENTH JUDICIAL DISTRICT DISTRICT COURT, SEDGWICK COUNTY, KANSAS CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated August 9, 2002]

THE STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
REGINALD D. CARR,	)
	)
Defendant.	)
	)
THE STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JONATHAN D. CARR,	)
	)
Defendant.	)
	)

PRETRIAL CONFERENCE
MOTIONS

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of

Sedgwick County, Kansas, at Wichita, Sedgwick County, Kansas, on the **9th day of August, 2002.**

APPEARANCES

PLAINTIFF:
Ms. Nola Foulston
District Attorney
Ms. Kim Parker
Deputy District Attorney
Sedgwick County Courthouse Annex
535 North Main Street
Wichita, Kansas – 67203

DEFENDANT REGINALD D. CARR (Appearing in person):
Mr. Jay E. Greeno
Of Counsel, REALS & WEBER
Attorneys at Law
Suite 215
250 North Water
Wichita, Kansas – 67202
and
Mr. John V. Wachtel
KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC
1600 Epic Center
301 North Main
Wichita, Kansas – 67202

DEFENDANT JONATHAN D. CARR (Appearing in person):
Mr. Ronald F. Evans
Mr. Mark A. Manna
Attorneys At Law
Death Penalty Defense Unit

Suite 302
112 Southwest Sixth Street
Topeka, Kansas – 66603

SANDRA J. BERGER, CSR
Official Court Reporter

* * *

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THE COURT: Nobody has said --

MR. EVANS: I think so.

THE COURT: Mr. Wachtel, same question.

MR. WACHTEL: I'm sorry, Your Honor, I utterly missed the question.

THE COURT: Are you satisfied you know who the witnesses are that they intend to call?

MR. WACHTEL: I'm satisfied that I have the names. I'm not -- as I spoke with Ms. Foulston just briefly, I'm not satisfied I know who a couple of these people are. And perhaps by taking this to the heel of the docket I can resolve that for you.

THE COURT: Other than those listed on today's motion to endorse, are you satisfied you know what it is all the witnesses have to say?

MR. WACHTEL: Yes, I think I am.

THE COURT: Okay. Thank you.

We've already covered exhibits and motions for dismissal, judgments on pleadings, or summary judgment. That would be include, I believe, Mr. Jonathan Carr's renewed motion for discovery. Are we ready to take that up at this time?

MR. EVANS: I am, Judge.

MS. PARKER: Yes, Your Honor.

THE COURT: Okay. Would you do your

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argument from the lectern over there, if you would, please. See how that works.

(Off-the-record discussion.)

MR. EVANS: I thought I heard you at the last time the severance matter was discussed, if not invite us, then, certainly allow us to bring it back up, so we filed a second motion for severance, Judge.

THE COURT: I did.

MR. EVANS: And I have -- have you got a copy of it?

THE COURT: I did not. It's in the file?

MR. EVANS: Yes, sir. And frankly, Judge, we -- the argument is the same. I think we bolstered the argument a little bit with some additional authority. But the argument for severance is in essence the same argument we made last time.

I think there are three reasons why this case must be severed. The State -- the cases that consider severance in Kansas are all noncapital cases, but they are all consistent in listing five categories.

Number one, the defendants have an antagonistic defense. Judge, the clearest way I can put Jonathan Carr's defense right now is he denies categorically his participation in the events he's

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accused of. His defense will be he was in Tronda Adams' house early the morning of December 15th. His big brother Reggie brought items over, cash, a ring, left those items with him. He was not told of the crime. He did not participate in the crime. He is prepared to present an alibi to the jury.

Now, that is as clear as I can make our defense. I can't think of a way to put it that doesn't put the State on notice of where we're going. I will be glad to answer any questions if I can answer them if the Court doesn't think that sufficiently speaks to the allegation of what our defense is.

Now, is that defense antagonistic to Reginald Carr's? Judge, I don't know what his defense is. I didn't hear an assertion of Reginald Carr's defense in open court when we last brought this matter up. It is my memory that Mr. Greeno told you that -- and had handed you previously -- or previously filed under seal allegations and assertions of what Reginald's defense would be. I didn't get a copy of that. I don't have access to that, Judge. I don't -- certainly don't have access to Reginald Carr. I can't go interview him in the jail without losing my license to practice. I can talk to his lawyers, and I talked to his lawyers, and I told his lawyers, Mr. Greeno and

[p.11]

Mr. Wachtel, both, this is our defense. Does your defense -- can you tell me what your defense is? And it's my understanding they decline to do so. They still decline to do so. Does your defense conflict with

Jonathan's defense to the extent -- I think I asked them this question as specifically as I could, Judge. Does it conflict with Jonathan's defense to the point that Reginald's defense is irreconcilable with Jonathan's defense? And are the defenses mutually exclusive? I take those terms to mean that the jury could not believe both defenses if the defenses are in fact against each other. I think that is the essence of the antagonistic defense. That is certainly the essence of antagonistic defense that should get defendants a severance.

I think I've done as much as I can for the Court. And I think the first prong of any one of these five should get a severance, I think certainly the antagonistic defense is here and would require a severance in and of itself.

But the second reason for a severance, important evidence in favor of one of the defendants would be admissible in a separate trial, would not be allowed in a joint trial. Well, do we have that here? Judge, we clearly do. You're not going to find much

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case law -- in fact, you're not going to find any case law in Kansas as to this -- this prong and the way it relates to this case because capital cases -- since '94, since the death penalty has come back in Kansas, I don't think this has ever been tried. I don't think joint trials have ever been sought of multi-defendant cases in a capital case in Kansas.

But important evidence for one would be admissible if they were separated but would not be allowed in a joint trial. We certainly have that here,

Judge. I mean, you know this because you ruled on this motion last week and it was Mr. Greeno, Mr. Wachtel's motion to limine us and the State from introducing Reginald's prison record, introducing Reginald's prior -- introducing bad acts of Reginald.

Now, in all candor, Your Honor, I don't know any way around this. We get to the second stage of this case, I'm not saying we're going to, but if we do, we get to the second stage of this case, you've got Reginald sitting next to his brother Jonathan, counsel wants to introduce evidence against Reginald about his bad character, about his propensity for violence, about what he did in prison, about his conviction. I don't know of any -- and I haven't seen anything cited by the State that says this is

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inadmissible. I can't find any authority that makes this inadmissible, especially when you look at the relaxed state of the evidence code.

When we get to the second stage, the evidence code doesn't apply. This evidence, would it be relevant in favor of Jonathan? Absolutely. It goes to two statutory mitigators. It goes to Jonathan's role in the offense. *Woodson versus North Carolina* says that the jury must -- must consider the defendant's individual degree of culpability. It has to be admissible for Jonathan. Judge, that is a red flagger, or that will get him a new trial, in all candor. And perhaps -- I don't mean to be flippant with the Court, but I can't stress how serious we are about that.

As to Reginald -- Reginald's not my client, I don't care about Reginald. As a lawyer, I care about Jonathan. But if you let this in against Jonathan or in favor of Jonathan, Reginald has a pretty good complaint. You're introducing evidence that absolutely goes to no aggravating circumstance. Doesn't go to any of the ones alleged, it doesn't go to any of the seven that are in existence. It doesn't go to any of the aggravators. It might come in, I suppose, if Reginald took the stand and somehow opened

[p.14]

the door. But if he doesn't, and that's the only reason that we -- you've kept them together, they might open the door, if he doesn't, we've gone through what I think is going to be about a 2-1/2-month trial, 3-month trial only for it to require a severance at the end. And that's certainly not a good use of judicial economy.

So I think the second -- the second prong -- the second reason why you grant a severance in a multi defendant case clearly is there. And I have yet to hear an argument against that. The State has provided a response to us. I don't hear an argument against that in the response. I see them cite a *Fox* case out of Oklahoma, *Fox versus State,* a case that I have some familiarity with. The problem with citing *Fox* is you have to be careful about going to Oklahoma to get your law on death penalty cases. Oklahoma has a different sentencing scheme. Oklahoma has the continuing threat, the likelihood that the defendant would commit a future act of violence and thereby constitute a continuing threat

to society. That aggravator is in Oklahoma, was when *Fox* was tried. It's not here. Our legislature, God bless them, has seen fit to keep that off of our books. And I -- God bless them because that is Katy, bar the door, Your Honor, when you're

* * *

[p.103]

CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

I, Sandra J. Berger, a Certified Shorthand Reporter, and a regularly appointed, qualified, and acting Official Reporter of the 18th Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in **Case No. 00 CR 2978, *THE STATE OF KANSAS, Plaintiff, v. REGINALD D. CARR, Defendant,*** and **Case No. 00 CR 2979, *THE STATE OF KANSAS, Plaintiff, v. JONATHAN D. CARR, Defendant,*** heard on the 9th day of August, 2002, before the Honorable Paul W. Clark, Judge of Division No. 9 of said Court.

I further certify that at the request of Mr. Debra J. Wilson and Rebecca E. Woodman, Capital Appellete Defenders, a transcript of my shorthand notes was typed by me or under my supervision via computer-aided transcription, and that the foregoing transcript, consisting of 102 typewritten pages, is a true copy of all

of the proceedings, all to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Wichita, Kansas, this 20th day of March, 2003.

/s/Sandra J. Berger
SANDRA J. BERGER
CERTIFIED SHORTHAND REPORTER

SANDRA J. BERGER, CSR
Official Court Reporter

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 4, 2002]

THE STATE OF KANSAS,

Plaintiff,

vs.

REGINALD D. CARR,

Defendant.

THE STATE OF KANSAS,

Plaintiff,

vs.

JONATHAN D. CARR,

Defendant.

JURY TRIAL
Volume 40

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of

Sedgwick County, Kansas, at Wichita, Sedgwick County, Kansas, on the **4th day of November, 2002**.

APPEARANCES

PLAINTIFF:
Ms. Nola Foulston
District Attorney
Ms. Kim Parker
Deputy District Attorney
Mr. Kevin O'Connor
Assistant District Attorney
Sedgwick County Courthouse Annex
535 North Main Street
Wichita, Kansas – 67203

DEFENDANT REGINALD D. CARR (Appearing in person):
Mr. Jay E. Greeno
Of Counsel, REALS & WEBER
Attorneys at Law
Suite 215
250 North Water
Wichita, Kansas – 67202
and
Mr. John V. Wachtel
KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC
1600 Epic Center
301 North Main
Wichita, Kansas – 67202

DEFENDANT JONATHAN D. CARR (Appearing in person):
Mr. Ronald F. Evans
Mr. Mark A. Manna

Attorneys At Law
Death Penalty Defense Unit
Suite 302
112 Southwest Sixth Street
Topeka, Kansas – 66603

SANDRA J. BERGER, CSR
Official Court Reporter

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SANDRA J. BERGER, CSR
Official Court Reporter

* * *

[p.33] [*Cont. Jonathan Dexter Carr Verdict*]

THE COURT: Mrs. Foulston, continuing on.

MS. FOULSTON: Thank you, Your Honor.

On January the 17th the State provided notice to the defendants, Jonathan and Reginald Carr, those aggravating circumstances that the State would rely upon in any sentencing proceeding.

The following aggravating circumstances were provided:

1. That the defendants, each of them, knowingly or purposely killed or created a great risk of death to more than one person;

No. 2. That the defendants, Reginald and Jonathan Carr, committed the crime for their own self or for another for the purpose of receiving money or any other thing of monetary value;

No. 3. The defendants, Jonathan and Reginald Carr, committed the crime in order to avoid or prevent lawful arrest or prosecution;

And No. 4 aggravating circumstance upon which the State intends to rely is that the defendant, Reginald Carr and Jonathan Carr, committed the crime in an especially heinous, cruel and atrocious manner.

After trial and conviction, the State reiterates its intent to rely upon the same aggravating factors to argue that the death penalty is

* * *

[p.44]

CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

I, Sandra J. Berger, a Certified Shorthand Reporter, and a regularly appointed, qualified, and acting Official Reporter of the 18th Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in **Case No. 00 CR 2978, *THE STATE OF KANSAS, Plaintiff, v. REGINALD D. CARR, Defendant,*** and **Case No. 00 CR 2979, *THE STATE OF KANSAS, Plaintiff, v. JONATHAN D. CARR, Defendant,*** heard on the 4th day of November, 2002, before the Honorable Paul W. Clark, Judge of Division No. 9 of said Court.

I further certify that at the request of Debra J. Wilson and Rebecca E. Woodman, Capital Appellete Defenders, a transcript of my shorthand notes was typed by me or under my supervision via computer-aided transcription, and that the foregoing transcript Volume 40, consisting of 43 typewritten pages, is a true copy of all of the proceedings, all to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Wichita, Kansas, this 21st day of March, 2003.

/s/Sandra J. Berger
SANDRA J. BERGER
CERTIFIED SHORTHAND REPORTER

SANDRA J. BERGER, CSR
Official Court Reporter

IN THE EIGHTEENTH JUDICIAL DISTRICT DISTRICT COURT, SEDGWICK COUNTY, KANSAS CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 5, 2002]

THE STATE OF KANSAS,

Plaintiff,

vs.

REGINALD D. CARR,

Defendant.

THE STATE OF KANSAS,

Plaintiff,

vs.

JONATHAN D. CARR,

Defendant.

JURY TRIAL
Volume 41-A

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of

Sedgwick County, Kansas, at Wichita, Sedgwick County, Kansas, on the **5th day of November, 2002.**

APPEARANCES

PLAINTIFF:
Ms. Nola Foulston
District Attorney
Ms. Kim Parker
Deputy District Attorney
Mr. Kevin O'Connor
Assistant District Attorney
Sedgwick County Courthouse Annex
535 North Main Street
Wichita, Kansas – 67203

DEFENDANT REGINALD D. CARR (Appearing in person):
Mr. Jay E. Greeno
Of Counsel, REALS & WEBER
Attorneys at Law
Suite 215
250 North Water
Wichita, Kansas – 67202
and
Mr. John V Wachtel
KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC
1600 Epic Center
301 North Main
Wichita, Kansas – 67202

DEFENDANT JONATHAN D. CARR (Appearing in person):
Mr. Ronald F. Evans
Mr. Mark A. Manna

Attorneys At Law
Death Penalty Defense Unit
Suite 302
112 Southwest Sixth Street
Topeka, Kansas – 66603

SANDRA J. BERGER, CSR
Official Court Reporter

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* * *

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It's not a concern for the safety of -- well, Mr. Manna would be the first one to go, frankly. It's not a concern for that. It's a flight concern. I see -- I look around me, I see Kevin sitting there to block any exit there. I see Joe Burns sitting there. I see Rick Craig, solid as a rock, to block any exit. And I don't think it's necessary.

I think until there's been some evidence, there's some indication that he is going to -- going to flee, that that injects something into this -- I mean, any time you shackle somebody, it comes with a lot of concerns. We're all human beings here making mistakes. I make several a day. And -- certainly, at least. And some of the jurors might see him come in or out. And I think the -- as you well know, Judge, you have to balance that against the necessity of this. I don't think there has been any showing of necessity.

THE COURT: Thank you.

While there's evidence of flight at the beginning, there's been nothing that would indicate misconduct on behalf of Mr. Jonathan Carr at all in any of the proceedings I've been involved in. The sheriff's procedures, however, I think, ought to be followed. And this is the way we will do it.

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Once Mr. Jonathan Carr is seated, then the leg irons will be placed. They will be placed in such way

that they may not be -- or cannot be observed by anyone on the jury. It is not necessary, I don't believe, that he have them when he comes in or when he leaves. But just when he's seated here, once we start the proceeding.

And I don't -- you all on behalf of the district attorney can say anything you want. It's actually a sheriff matter. So --

MS. PARKER: And I think the record should reflect that the table is still covered so that he cannot be seen in the seated position in the restraints. And certainly the Court's decision and the validity of the sheriff's rules, just because we have individuals placed and they stand solid does not mean that their lives should be put at risk.

THE COURT: And I don't Sergeant Miller, do you have the --

SERGEANT MILLER: I will get them.

THE COURT: Does Mr. Jonathan Carr have -- you're going to go get them. Okay. We'll do that then.

I've given you lawyers, while we're waiting, the instruction before evidence, penalty phase, that I

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intend to read to the jury before we start the proceedings.

I believe the shields set up and taped to the table are such that nobody can see from the jury box under the table at all.

Okay. Anything else in that regard?

MR. EVANS: No, sir.

THE COURT: Okay. Mr. Greeno, I understand your client will not put the sweater over his handcuffs. And if the jury sees it, then the defendant has invited it --

MR. GREENO: I understand, Your Honor.

THE COURT: -- in my opinion. So he can either have the sweater, not have the sweater, whatever he wants. Do you want to visit with him about it?

(Off-the-record discussion.)

MR. GREENO: Mr. Carr doesn't see the point in it, so he's elected not to use it. It's his choice. Nothing I can do about it.

THE COURT: And he's -- it's made known to the jury, he's the one that broadcast it, then.

Are we ready, then, for the jury?

MR. EVANS: Yes, sir.

THE COURT: Ms. Marquez, bring the jury,

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please.

(The jury returned to the courtroom, after which the following proceedings were had.)

THE COURT: Good morning, members of the jury.

THE PANEL: (Responding).

THE COURT: That document being handed you by Ms. Marquez is a copy of an instruction before evidence in this stage. And as we've done in the past, I'm going to read it. Please read along with me as soon as you get your copy.

Okay. Everybody has a copy?

Okay. Read along with me, please.

"Instruction before evidence, penalty phase."

"This is the penalty phase of the trial. The focus will be on the first four counts. These are the capital murder counts. It is the responsibility of the jury to decide the proper sentence for the individual defendant in these counts.

"It is my responsibility to decide on a proper sentence for the individual defendant in all other counts in which you returned a verdict of guilty.

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"The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.

"Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequence, but which are above or beyond the elements of the crime itself.

"Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.

"The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh any mitigating circumstances found to exist.

"The decision of the jury should not be based on the number of aggravating or mitigating circumstances that are shown to exist."

Hang on to that, please. Just add it to your packets.

[p.10] [*Opening by Ms. Foulston*]

Are you ready for the State?

MS. FOULSTON: State's ready, Your Honor.

THE COURT: Mrs. Nola Foulston, District Attorney, State of Kansas.

MS. FOULSTON: May it please the Court.

THE COURT: Mrs. Foulston.

MS. FOULSTON: Counsel, ladies and gentlemen of the jury.

The guilt phase of this case has been concluded with the verdicts that have been established by this jury and entered into the record yesterday. If we reflect back to the time that you went through a jury selection process, that long and arduous process, where you were questioned as a number of jurors all together and then singly, independently about your thoughts on capital punishment, the death penalty and what as a juror would be you responsibility.

And I believe that the information that was presented to you not only by the Court, not only by the State, but by counsel for both defendants was that the State was required to prove that aggravating circumstances attendant to these crimes that committed -- these capital murders must outweigh any mitigators that are presented by the defendants, whatever they choose to prove to show or lessen or to

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change any culpability under the death penalty statute.

In Kansas, in 1994, the death penalty became law. And at that time there were great debates. The law is that in the State of Kansas if you commit a capital offense and if the aggravating factors outweigh the mitigating factors, then the sentence shall be death. There is no debate that that is the law. And jurors as officers of the court are sworn to follow that law if they find that the evidence that's presented by the State has shown that any mitigating circumstances don't rise to the threshold

of mitigating that which has occurred, the deaths of Aaron Sander, Jason Befort, Heather Muller and Brad Heyka. And also, of course, while it's not a charged offense, the critical injury received by H. G.

In choosing to make a law, the State of Kansas said that we want to make sure that it is narrow in scope rather than broad. To select only those crimes that fall within the ambit of that which deserves to be considered for the death penalty. And so it was the State chose those particular portions of the capital statute, A. and B., that on these verdict forms each were circled in each count reflecting the jury's decision that the State had met its burden to

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prove without reasonable doubt that these deaths resulted after substantial sexual degradation and assault and that there was a killing of four individuals. A. and B. And those were found against each defendant, Reginald and Jonathan Carr.

So as they stand here convicted of those cases and those charges, it is then the jury's responsibility to then look at the aggravating circumstances that apply that the State says are incorporated into all of the evidence that has been presented. Evidence that the State believes is appropriate for the jury to enter its recommendation that death is the appropriate penalty.

You have heard in the instructions before the penalty phase that which are contemplated as mitigating circumstances. Anything, in fairness, may be considered as extenuating or reducing the degree of moral culpability or blame or which

justifies a sentence of less than death, even though it does not justify or excuse the offense. That is the responsibility of the defendants, to bring that evidence to you so that you may weigh and measure it against those aggravating circumstances that the State has set forth with particularity.

And again, under the Kansas law, the State

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is required to select from a limited section that provides only those circumstances upon which the State can rely in asking for the death penalty. Those are the aggravating factors. Those factors apply in all of the cases of Counts 1, 2, 3 and 4 with regard to Brad Heyka, Jason Befort, Aaron Sander and Heather Muller.

And when I speak of those cases, I speak of those individuals, those individuals' death under the circumstances that occurred the 14th and 15th of December in the year 2000. Circumstances, evidence, information, witnesses's testimony that you have listened to patiently in reaching the verdict at first that there was culpability and guilt and now to determine whether or not the killing was of such an aggravated manner that there is no mitigation that can rise to the threshold. And that is the State's position.

The mitigators that we have all along identified in this case and made known from the beginning of this case, that is the requirement that is placed upon the State, so that it is known exactly where we are going with our evidence and what we intend to

prove. Those aggravators that you will have on the verdict form relate to those four capital

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cases. And they are each -- in each count they are each the same.

The first is that the defendants, Jonathan and Reginald Carr, knowingly or purposely killed or created a great risk to more than one person. You will find from your review of the evidence, from your discussions that in this particular case five individuals were terrorized, were beaten or raped or sodomized or robbed or humiliated and degraded and culminated in the killing of four and in the great risk of death to H. G., the lone survivor. While she is not counted as a capital case, because thankfully she was here to tell her story, nevertheless, the great risk of harm that was presented to her may also be considered.

The State states that there is no mitigation from the fact that these defendants, Jonathan and Reginald Carr, committed the crime for themselves or for another. And that their purpose was to receive money or anything of value. And you may consider the evidence in this case to lead you to the conclusion that this is an aggravating circumstance that has been proved by the State without a reasonable doubt.

We look to the home. We look to a home that's been ransacked. We listened to the testimony.

* * *

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disregard of their lives. To leave no person behind to tell the story, to leave no person behind to say what heinous and cruel and atrocious things had happened before they were executed on that field.

And when they left that field, ladies and gentlemen, the evidence has shown, going upon their way back to the Birchwood location, filling their trucks with the loot, with the things that they desired that caused the death of these young people, counting the money in their pockets, fondling the ring that was taken from Heather's finger, looking at the watches that were taken, looking at the clothing and looking at shoes that probably never would have fit anyway, oh, what a surprise to learn that one young person had survived, by whatever reason.

She was meant to die. She was meant not to be able to tell the story of these atrocities, of these cruel intentions, of these heinous ideas and depraved conduct of Jonathan and Reginald Carr together. Together. She survived and it wasn't meant to be, because had she moved, had she not laid in the snow, had she not been run over by the truck and continued to play dead, surely her life too would have ended on that field. But it didn't. That doesn't negate the fact that they chose to leave no witnesses.

* * *

[p.27] [*Opening by Mr. Evans*]

They're going to talk to you about how Reggie's father abandoned him. You may hear how Reginald's father was contact in this particular case and had nothing to do with him. Had absolutely nothing to do with him.

We're going to hope to explain to you in the end, when you go back to deliberate, if you can understand, how this little boy right here, this happy little boy, became this individual right here. The person that did the acts in the early morning hours of December the 15th in the year 2000.

In the end we're going to ask for your understanding. We're going to ask for you to hold Reginald Carr accountable for what he's done and we're going to ask you to punish Reginald Carr, but we're going to ask you to extend the mercy to Reginald Carr that he did not extend to those four young individuals in the early morning hours of December the 15th. And we hope and we pray that we're going to be able to give you the reasons to extend that mercy to Reginald Carr.

Thank you very much.

THE COURT: Thank you.

Opening address for Mr. Jonathan Carr, Mr. Ron Evans.

MR. EVANS: Good morning, ladies and

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gentlemen.

I can tell you this won't be a debate on how bad these crimes are. They're horrible. There's no getting around that. But there is one thing to keep in mind, regardless of what you decide at the end of this week or the start of next week, when you go back in that room again and you make a decision about life or death, Jonathan Carr's 22 years old. And he's going to be in prison the rest of his life. Whether he's executed there or he dies there because you've seen fit to spare his life, that's where he's going.

So this isn't about blame, this isn't about shifting responsibility. You held him responsible yesterday. You blamed him, as I expected you to.

I tried not to waste your time since this trial got started. And I will try not to waste your time this week. But there are some things that you need to know about this young man before you sentence him. I don't know that you'll think that they're important because I don't know you know that well and I know you now as well as I ever will. But you need to know him a little better before you sentence him.

Mitigating evidence is what you decide it is. You decide how much mitigating evidence is worth. And you all come at this from different perspectives.

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That's why we asked you those questions last month, the month before that about, you know, your being strong and having a perspective of your own and how -- what's important to one juror about mitigating might not be important to another. So I

try not to be too much of an editor. If there's something that I think you need to hear, then I try to put it on you and let you decide how much -- what you think it's worth.

* * *

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surgery that led to complications. She died very young. Jonathan didn't really know her. He was just a baby when she died. But it caused this family that was already weak to tumble.

And Reginald, Senior, lost it. He was not a strong man to begin with. He became completely worthless after that child died. Janice blamed him for the death. He drank, he got depressed, was in and out of the mental hospitals, eventually moved away from the family. These boys, young men, they don't know him. As Mr. Greeno said, we sought his input. He wasn't interested in this case. He hasn't had anything to do with these young men for years. He doesn't really know them.

There are some extended family there in the Cleveland area. Unfortunately, none particularly good role models. None particularly to step in and mentor either one of these young men. Barbara, the grandmother, Janice's mother, severely mentally ill. Another uncle, Michael, severely mentally ill. Barbara is so mentally ill she gets thrown off planes. I wanted to bring her here to show you folks, could not get her here. You'll hear some other family members talk about Barbara.

Something else I think you need to know.

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When Jonathan was in grade school going to the Harvey Rice grade school, he was about seven years old, he got charged with a rape. Got charged with raping another seven-year-old little girl. This was a case that got some notoriety in Cleveland because this was seven-year-olds, Jonathan and two other young men, seven, boys, not young men, accused of raping another seven-year-old girl. He was eventually exonerated of that. The father of the little girl, come to find out, was the one that was molesting the little girl.

But Jonathan got to wear the tag of the Harvey Rice rapist. Other children taunted him. Janice decided it was time to get him out of town. He moved down to Brownsville to live with another family member you're going to meet, Phyllis.

MS. FOULSTON: Excuse me, Your Honor, Mr. Evans.

Your Honor, objection to the statements of counsel with regard to information that apparently is not going to be placed in evidence but for counsel's comments. And on that basis to the form of his statements and to the hearsay of things he's placing before a jury and then telling them they're not going to hear.

THE COURT: Opening addresses should be

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limited to that evidence the lawyers intend to present on behalf of their clients or things they are

going to bring up for your consideration in mitigation.

Mr. Evans, please press on.

MR. EVANS: And I expect you all to hold me to that.

When he got to Brownsville, his Aunt Phyllis will tell you about what Jonathan was like. He was seven years old, he loves his mother, he missed his mother. He was down there with Phyllis who is a physician. She's a doctor. She will tell you about what Jonathan was like then. She called him "the Screaming Man" because he cried from the time that he woke up until the time that he went to bed. Always screaming.

She found him to have learning disabilities. And you'll hear about those disabilities. He's dyslexic. When he got into school he had to have exams read to him because he could not read them. The children taunted him about that. Is that mitigating? Does that mitigate what's happened here? I don't know. I don't know. But should you hear it -- you're going to hear it.

He got held back in middle school. History of mental illness in his family. Jonathan tried to

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hang himself when he was seven. When he was 16, his big brother Reggie was going off to prison, tried to kill himself again, Jonathan did, by drinking anti-freeze.

There's some history here that I think you need to hear about how he came to sit here convicted of these horrible crimes. There's something else you need to hear about him. There's some good in him. He's touched some people. When he's not around Reggie, he does pretty well. You're going to hear from some people from Dodge, an older couple, the Culvers. They knew him, they -- he worked for them to some extent. They love this young man. They've been watching this on television. They cannot believe he did this. These crimes compared to the mán, the young man, the boy, they knew in Dodge, make no sense to them. But he touched them and they want to talk to you and they will sometime this week because you need to know that there is some good in this young man.

You'll hear from a Jesse Harris. He's coming in from Cleveland. He'll talk to you about the Jonathan that he knows. He can't believe Jonathan did this. He wants an explanation. There's no explanation for something like this. What would the explanation possibly be? What could it possibly be to

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explain this away?

But that's not what this hearing is about, ladies and gentlemen. That's what the last one was about. You didn't hear us try to explain away, certainly not, the events of Birchwood. There is no explanation. But you've got a very young man sitting over here. A young man that prior to these crimes with no serious involvement with the law.

And you'll be asking to give him the ultimate punishment. It's a hard thing we ask you to do, to make a decision like this. I hope when you finished hearing this evidence, you'll see fit to spare his life.

Thank you, Judge.

THE COURT: Thank you.

Ms. Parker and Ms. Foulston -- Mrs. Foulston. Ms. Parker. Ready for the State's case in chief.

MS. FOULSTON: Your Honor, as the State's case in chief, we ask the jury and the Court to incorporate all the witnesses, all 97 witnesses, those who testified, during the State's case in chief during the guilt phase, those that testified in the defense case in chief for Reginald Carr and for Jonathan Carr, all of that evidence that relates to the capital murder deaths of Aaron Sander, Brad Heyka, Jason

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Befort and Heather Muller, and as it relates to the aggravating factors that the State must prove beyond a reasonable doubt that the defendant -- defendants knowingly or purposely killed or created a great risk of death to more than one person, as it relates to the aggravating factor that the defendants committed the crime for the defendants' self or another, for the purpose of receiving money or any other thing of monetary value, all the evidence in -- that has the -- the jury has previously heard as it relates to the defendants committed the crime in order to prevent a lawful arrest or prosecution, and all the evidence that was presented during the guilt phase as it relates to the

defendants committed the crime in an especially heinous, atrocious or cruel manner, including all exhibits that were admitted by both the State and the defendants and the stipulations.

With that, Your Honor, the State rests its case in chief.

* * *

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MR. EVANS: Your Honor, as is true with the close of the evidence in other stages of the case, we would make the same motions and we would reurge all previous motions.

MR. GREENO: Same announcement, Your Honor.

THE COURT: The same ruling.

Mrs. Harding, the next witness -- Mrs. Harding does not wish to have her evidence broadcast in any manner, either by sound or in picture.

Is that right, Ms. Harding?

THE WITNESS: Yes, sir.

THE COURT: That's what we'll do.

Mr. Greeno.

MR. GREENO: Thank you, Your Honor.

JANICE HARDING,

called as a witness herein on behalf of the Defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. GREENO:

Q. Would you please tell these people your name.

A. My name's Janice Harding.

Q. You're going to have to speak up, Ms. Harding.

A. My name is Janice Harding.

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MR. GREENO: Okay. Move this up a little bit.

That is not much help, is it?

MR. GREENO:

Q. Ms. Harding, you don't want to be here today; is that right?

A. Yeah, it's a hurting thing.

Q. I understand. You are Reginald and Jonathan's mother; is that correct?

A. Yes, I am.

Q. There was a period of time when you lived in Cleveland, Ohio; is that right?

A. Yes.

Q. And when you lived in Cleveland, Ohio, you had some children; is that right?

A. Yes, I did.

Q. Let's talk about that, okay?

A. All right.

Q. Who was your first born child?

A. Temica.

Q. And when was Temica born?

A. [REDACTED], 1974.

Q. Mrs. Harding, how old were you when she was born?

A. 16.

Q. And Temica's father was?

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A. Reginald Carr, Senior.

Q. And how old was Reginald Carr, Senior?

A. 17.

Q. When you had Temica, what was your life like?

A. I was in school. Just growing up. It was all right.

Q. Did you marry -- were you married to Reginald Carr when you had Temica?

A. We married when I turned 18 and he was 19.

Q. Okay. Was there a period of time when you and Reginald Carr ran off together?

A. Yeah. I left home when I was 16 and he and I lived together. And when I turned 18, and we got married three days after my 18th birthday.

Q. Was that because you couldn't get permission from anybody's parents to get married?

A. We couldn't get permission from my mother.

Q. Was there a period of time when Temica lived out -- when Temica didn't live with you?

A. Yes.

Q. Can tell us about that, please.

A. When my sister moved to California and my mom was going with her, she was doing part of her residency, I'm not sure, and it was an opportunity for Temica to go to a private school. And my sister asked me if she could go and I told her yes. And so she went out to

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California with my sister and my mother and my sister's little girl.

Q. During the first year of Temica's life, did she live with her paternal grandmother?

A. For about the first -- yeah, the first year. Yeah, the first year we stayed there.

Q. Then who Has the next child that you had?

A. Reginald.

Q. And when was Reginald born?

A. [REDACTED], 1977.

Q. And where was he born at?

A. He was born at Rainbow Babies and Children Hospital in Cleveland, Ohio.

Q. How were you -- how old were you then?

A. 19.

Q. Okay. I want to talk about your pregnancy with Reginald. Was it normal?

A. My pregnancy with all the children, I had premature labor. I have what they called an incompetent cervix. And so in order to carry the children to a term where I could deliver, I had to have a slip stitch put in my cervix so that I wouldn't miscarry.

Q. Was Reggie born prematurely?

A. All my children were premature.

Q. How much premature was Reginald born?

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A. Gee, Reggie was a couple months premature. He stayed in the hospital 3-1/2, almost 4 months, maybe a little longer.

Q. Before --

A. A little longer.

Q. Before he got to go home?

A. Before he got to go home, yes.

Q. Okay. Can you speak up just a little bit more?

A. Okay.

Q. And then the next child that you had?

A. I had a daughter Regina. She was born [REDACTED], 1979.

Q. And I take it from your previous comments that Regina was born prematurely as well?

A. Yes.

Q. Did she develop any serious disease early on in her life?

A. Well, all the children had jaundice at birth. And had to go under the bilirubin light and were all incubators for a while. Gina developed what is known as Williams' tumor which is a cancer.

Q. How old was she when that was diagnosed?

A. Two.

Q. Okay.

A. Her abdomen swelled. We were on vacation at the time,

* * *

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Q. Upon reflection, do you feel that you kind of became withdrawn?

A. I became withdrawn from their father, yeah.

Q. Well, tell us about that.

A. Well, we were staying on Eldemere in Cleveland. And Reggie and I weren't getting along. We were doing a lot of arguing, a lot of fussing, you know, a lot of fighting. And I would leave. I would go stay at my godparents' house a couple days at a time, then go back home. And this went on for a few months. And finally --

Q. I'm --

A. -- Reggie went to work and --

Is this better?

Q. Oh, yeah.

A. Reggie went to work and I went home and I packed up everything in the house, put everything in storage and moved in with my godparents.

Q. Let me ask you about these fights that you had with Reggie, Senior. Did they sometimes take place in front of the children?

A. I never thought they took place in front of the children. Now, they may have. The children may have gotten up and seen us fighting. But as far as I was aware, they were not being taken place in front of the

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children. None of the children ever said anything to me about it to this day. So if it took place in front of the children, I was unaware of it.

Q. Was there a lot of yelling and screaming?

A. Yeah, there could be some yelling and screaming.

Q. Did they ever escalate into physical violence?

A. Yeah, their dad used to hit me.

Q. Did you ever hit him?

A. Oh, yeah. I got him real good one time.

Q. Tell us about that.

A. Well, we were arguing and he was just fussing and he had swung at me and I picked a bat up and I beat him with it. I told him he wasn't going to hit me again.

Q. When you left and you moved over to your godparents' house, what happened then?

A. Well, I stayed with them for several months. And --

Q. Did the children have any contact with Reginald, Senior, during that period of time?

A. No. Very little. He came by, I think, once. And that was -- no, twice. He came by once and told me that he wanted the car back and I told him he couldn't have it. It was packed in the backyard, my godfather's car was parked where he couldn't get it out. And I think a week later he came over and took the car. But when we stayed there, there was not any

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contact. He didn't come over there and I didn't take them to see him.

Q. How old was Reggie at that point in time?

A. Gees. He had to be maybe five or six.

Q. Okay. Did he seem to miss his father?

A. Yeah, he was always the father's favorite. More cared, to me, for his dad than the rest of the kids.

Q. I'm going to hand you what's been marked for identification purposes as Defendant's Exhibit A-16 and ask if you can identify that?

A. That's Reginald and his father.

Q. Do you have any idea about how old Reginald was when that picture was taken?

A. Maybe about 15, 16.

Q. Okay. Do you know how it was that Reginald came to see his father at that point in time?

A. He went to Ohio to visit his sister and --

Q. Reginald, Junior, or Senior?

A. Reginald, Junior, went to Ohio to visit his sister. And while he was there, he visited with his dad. His dad showed up.

Q. Was the dad living in Ohio at that point in time?

A. I'm not sure where his dad was living. I think he was still in California.

Q. We'll get to that a little bit later.

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A. Uh-huh.

MR. GREENO: Your Honor, I move for admission of Defendant's A-16.

MS. PARKER: No objection.

MR. EVANS: No objection.

THE COURT: It's admitted.

MR. GREENO:

Q. When you're living at your godparents' house, Reginald Carr, and you, Senior, are estranged, what happened after that?

A. I filed for divorce.

Q. Okay. Did you have some suspicions about Reginald Carr, Senior, and some infidelity? Do you think he was carrying on --

A. Yeah, I know he was carrying on.

Q. Tell us about that.

A. When we were going to church, you know, as a family, and I went in the hospital, my appendix ruptured. And while I was in the hospital, he had an affair. And we talked to elders in the church. And they told me that, you know, if I forgave him, we could stay together. And/or if I didn't want to forgive him, you know, we can go through other measures. I forgave him, we stayed together. Because at the time I wanted to have my family together. And he is a pretty nice

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person. He's a nice guy, you know. But as time went on, I fell out of love with him and decided to divorce him.

Q. Did he continue to drink?

A. Yes.

Q. Did he continue to drink heavily?

A. Yes.

Q. Did you continue to drink?

A. Yes.

Q. Did that add to the problems in your marriage?

A. Well, we weren't together, so -- by then.

Q. Okay.

A. I had left home by then, so that had nothing to do with the marriage. Actually, we were in the process of a divorce. It took a year to get the divorce because he contested it. I kept saying, no, he kept saying he wanted to remain married. And after a year, the judge granted us a divorce because we had been separated for over a year.

Q. What was going on with the kids at that point in time?

A. They were going to school. And in the summer, school was out, they would play with the kids in the neighborhood.

Q. Were they seeing their father?

A. Not often. Not often.

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Q. Did Reggie seem to miss his father?

A. Yeah. And also on weekends Reggie would go up and visit with his dad.

Q. How often do you think that happened?

A. He didn't go that often. Maybe three or four times to spend the night and once he went up and Jonathan went with him. Normally when he went, he went by his-self to go visit with his father.

Q. Did Reggie indicate to you that he missed his father?

A. Yeah. He wanted to go stay with him. And we were going to send him to go stay with his dad because he, you know, had started getting in a little bit of trouble. And I thought that if he went with his father because he bonded so well with his dad, maybe his dad could help him, you know, to stay out of trouble and kind of turn him around. But he never made it.

Q. Okay. We'll talk about that in a little bit, okay?

A. Uh-huh.

Q. At the time that you were separated Reginald, Senior, and you were seeking a divorce --

A. Uh-huh.

Q. And he was attempting to impede your efforts to get a divorce --

A. Uh-huh.

[p.52]

Q. -- did you ever have any contact with Reginald, Senior, over the telephone?

A. Yeah, I talked to him a few times.

Q. Did you ever talk to your friends or your relatives about Reginald, Senior?

A. Uh-huh.

Q. Did you talk about his infidelities?

A. Yeah.

Q. And understandably that probably didn't make you very happy; is that right?

A. No, it didn't. Who would be happy behind it?

Q. Did the children hear about all this?

A. It's possible. When you're angry, you don't care who's listening.

Q. So when did you get divorced, do you recall?

A. I think it was September of '70 we got -- '86. 1986.

Q. And how old was Reginald then? Reginald, Junior.

A. Ten.

Q. And where did his father go? Did his father stay there in Cleveland?

A. Yes, the dad stayed in Cleveland. I think two months after we were divorced he remarried.

Q. That was Anita Williams --

A. Yes.

Q. -- is that right?

[p.53]

And he had two more children?

A. Yes.

Q. Did he continued to maintain contact with his children? Did Reginald, Senior, contain to maintain contact with his children?

A. With my children?

Q. Uh-huh.

A. No.

Q. Did you -- did you try to encourage contact with Reginald, Senior, with Reggie and Jonathan?

A. No.

Q. And why is that?

A. Well, I figured we went to court and we were divorced, he knew he had parental rights and he was supposed to pick the kids up every other weekend. He never made an attempt to pick them up, I never made an attempt to take them to him. I figured he was married and if he didn't want to be bothered, I was not going to try to force them on him.

Q. I'm going to hand you what's been marked as Defendant's Exhibit A-9 and ask if you can identify that.

A. Yeah, that's Reggie and Jonathan at my mom's house.

Q. Your mom's house would be where?

A. Garfield Heights, Ohio.

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Q. Okay. A suburb of Cleveland; is that right?

A. Yes.

Q. Do you have any idea about when that picture was taken?

A. Well, Reggie must have been about six and Jonathan about three, seeing they are three years apart.

Q. Okay.

A. And Reggie's missing a tooth.

Q. Okay. It says '84 on their shirts.

A. Uh-huh.

Q. Would that be the year --

A. Yeah.

Q. -- when that picture was taken, do you think?

A. Yeah, it could be.

Q. That would have been prior to your divorce; is that right?

A. Yeah.

Q. And prior to your separation from Reginald Carr, Senior?

A. Yes.

Q. Boys pretty happy back at that point in time?

A. Yeah.

Q. Did they ever get in trouble, cause any problems?

A. Just the same stuff all little kids do.

MR. GREENO: Your Honor, we would move for

[p.55]

the admission of A-9.

MS. FOULSTON: No objection.

MR. EVANS: No objection.

THE COURT: It's admitted.

MR. GREENO:

Q. You said about two months after the divorce Reginald, Senior, remarried, didn't have a bunch of contact with his children. Did you ever hear any things from Reginald about missing his father, wanting to see his father?

A. Yeah, he said he wanted to see him. And he visited him a couple times, not many.

Q. Did you ever -- Reggie ever cry for his father?

A. No, not in front of me he didn't.

Q. Reggie was a pretty strong little kid?

A. Yeah.

Q. He was the oldest son; is that correct?

A. Yes.

Q. Did he attempt to step into that role, be the oldest son?

A. Oh, he stayed in the kid's place. He was pretty good.

Q. You said that at some point in time Reggie started to get in a little bit of trouble; is that right?

A. Yeah.

Q. When was that?

[p.56]

A. Well, not until we moved to Kansas did he get in any -- did either one of them get in trouble.

Q. I'm sorry?

A. I said not until we moved to Kansas did Reggie get in any kind of trouble. He was, like I said, a pretty good -- a good kid then. I just think that he started hanging out with kids that were older than him that were, you know, maybe bad influences. And he got in a few little things of trouble.

Q. And this is in Dodge City, you're talking about?

A. Yeah.

Q. Prior to moving to Dodge City, you embarked on a new relationship; is that correct?

A. Pardon?

Q. Prior to moving to Dodge City you became involved in a new relationship; is that correct?

A. Yes.

Q. How many -- well, did you date around a little bit before -- you're currently married; is that right?

A. Yeah.

Q. And who are you married to?

A. Rick Austin.

Q. And how long have you and Mr. Austin been married?

A. We've been married the last 8 years. We've been together 17 years.

* * *

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Q. And where does she fall in the range?

A. She's the oldest of us all.

Q. And she's a medical doctor; is that correct?

A. She's a pediatrician.

Q. And your children have spent some time with your sister; is that correct?

A. Quite a bit.

Q. Okay. Initially when you talked about Jonathan going down and living with Dr. Harding down in Texas; is that correct?

A. Brownsville, yes.

Q. Okay. And that was when Jonathan was about seven years old?

A. Six, seven. Yes, around that age.

Q. How long did he stay there?

A. A little over a year.

Q. Okay. And when he came back, where did he come back to?

A. He came back to stay with me. I was living in Garfield Heights.

Q. I'm sorry?

A. I was living in Garfield Heights, Ohio.

Q. Okay. Which is a suburb of Cleveland, correct?

A. Uh-huh.

Q. And then did you send Temica out to live with

[p.70]

Dr. Harding?

A. Temica went to Jon -- Temica went to California before Jonathan went to Brownsville.

Q. When did Temica go to California?

A. Temica went to California, I think when she was eight or nine. My sister had just finished school in Cincinnati, had just been hooded a doctor, and she was going to California to do her residency and she had just adopted a little girl and she asked me because I was separated their father and she had a little girl, that if she could take Mica with her. And, you know, when she got there, she was going to put them both in private school and dah, dah, dah. And they went and she went to a Lutheran school there.

Q. Okay. The daughter that Dr. Harding adopted, what is her name?

A. Barbara.

Q. When the children were growing up, did you and Reginald, Senior, admission any -- or administer any punishment when they misbehaved?

A. Yeah, I spanked my kids the same way my momma spanked me.

Q. Well, let's talk about that. How did you spank your children?

A. Well, I spanked them with belts. And if there was a

[p.71]

house shoe there and they did wrong, I picked them up and spanked them with that. And occasionally I picked up an extension cord and would spank them with that the same way I got spanked.

Q. Okay. Were there two specific belts that you used for spankings?

A. Yeah, I named two belts. One was called "Heat Daddy," and other one, I forget what his name was, but they both had names.

Q. Okay.

A. And now I got a little ruler that I spank with now.

Q. Okay. When the kids were going to get spanked with the belt, were they given the option of choosing which belt they got spanked with?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. How frequently would that occur?

A. Well, whenever they got in trouble. You know, if they didn't get in trouble, they didn't get spanked. But if they got in trouble, they did.

Q. What other kind of punishment did they have?

A. They would either stay in their room or got spankings, couldn't go outside. Well, they weren't kids that went outside anyway. They stayed in front of TVs

[p.72]

playing video games and stuff. So it wasn't like they went out a whole lot anyway. So --

Q. Okay. Was there a time when Reggie visited relatives in West Virginia?

A. Yeah.

Q. When was that?

A. I'm not sure how old he was, but he went to spend a summer with his step-cousin Jovan and aunt and uncle Shirley and Stevie.

Q. Where at in West Virginia?

A. Fairmont, West Virginia.

Q. Okay. And how long would he be gone?

A. He was going to be gone for the summer.

Q. Okay. Did he just go one summer or did he go more than one summer?

A. Just one summer. And he came home early because he had an accident while he was down there.

Q. Can you tell us about the accident?

A. Well, Shirley told -- called me and told me that Reggie and Jovan and another little boy were riding bicycles. And West Virginia is very hilly and they were coming down a hill, skidded on gravel and they fell and Reggie busted his knee open.

Q. Okay. Did she ever tell anything about Reggie losing consciousness?

[p.73]

A. No, she didn't tell me he lost consciousness.

Q. Okay.

A. He may have. I can't say he didn't.

Q. Okay.

A. And then she may have told me that and I don't remember.

Q. Sure. Were there -- we've already talked about the drinking that was going on in the home.

A. Uh-huh.

Q. And you didn't think it was excessive; is that right?

A. No, I didn't.

Q. Okay. Did you think Reginald, Senior's, drinking was excessive?

A. Periodically. Not too often.

Q. Did you notice any mood changes with him when he drank?

A. Sometimes. Not too often.

Q. Was there any drug use in the home?

A. Yeah.

Q. Can you tell us about that?

A. We used to smoke marijuana.

Q. Okay. How frequently?

A. On the weekends.

Q. Did the kids know about it?

A. Not that I know of.

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Q. Was there some point in time where they became aware of it?

A. Since I've spoken with the lawyers here, they tell me that, yes, the kids were aware of it. They never brought it to my attention when -- back those years ago.

Q. Okay. There's been some discussion about when you were gone from the home.

A. Uh-huh.

Q. Can you tell us a little bit more about that? What those circumstances were and how long you were gone.

A. Which -- what are you -- say that again.

Q. The times when you would leave --

A. Uh-huh.

Q. -- the home and not come back --

A. Uh-huh.

Q. -- for a couple of days.

A. Uh-huh.

Q. Can you tell us a little bit about those circumstances? What were you doing at the time? Were you involved with anybody?

A. I wasn't involved with anyone in particular. I was kind of leaving to get away from their father, from their dad. Their dad and I at the end of our relationship just did not get along. And as far as I

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shop. You all will cook what's here and cook for yourselves for a while. And that's what they did. And then when they cooked down to the last thing that was there, then I went shopping again.

Q. Is that the time that they describe as when they had to eat vegetables?

A. Uh-huh.

Q. Is that a yes?

A. Yes, it is.

Q. How long did that last?

A. Ooh. I guess the freezer was full, the cabinets were full. A couple weeks until they had deplenished what was there.

Q. When Reginald, Senior, left Cleveland, do you know where he went?

A. He went to California.

Q. And do you recall when that was?

A. No.

Q. Okay. Do you recall how long it was after your divorce that he left?

A. No, because he was married in between our divorce and him going to California. And I know he had a couple of kids in between there, so it was a couple years. I don't know how many. It was several years.

Q. And you said that Reginald, Senior, had sporadic

[p.80]

contact with Reginald, Junior; is that correct?

A. Yes.

Q. Did Reggie, Reggie, Junior, ever indicate an interest in seeing his father more often?

A. Well, he didn't indicate it, but I knew he wanted to go see his dad.

Q. Was there ever an occasion when there was some discussion about Reggie, Junior, going to California to visit his father?

A. Yeah.

Q. Can you tell us about that?

A. Well, Reggie was having problems in school. And I called his father and told him I wanted to -- you know, him to come up there and spend some time with him because Reggie -- I knew Reggie wanted to be with his dad. And maybe if he came out there and spent a little time with you, he would, you know, maybe straighten up a little bit because some sons do well with their fathers. And I know Reggie is -- you know, he enjoys his dad. Or did. At least that's what I thought, that's what I was assuming. And so I bought a train ticket for Reginald to go to California to go visit his father. And on the morning that I was supposed to put Reginald on the train, his dad called me at work and told me he couldn't come. And so he

[p.81]

didn't go.

Q. How old was Reginald -- Reggie, Junior, at that point in time?

A. About 13, 14.

Q. And how did you react to that?

A. I was angry.

Q. How did he react to it?

A. How did he react? He was disappointed.

Q. Did he say anything to you about it?

A. He just wanted to know how come he couldn't go. And I told him the truth. I told him your father said you couldn't come. So he didn't go.

Q. Did he ever see his father after that?

A. He saw his father, as far as I know, once after that.

Q. What other things did Reggie complain about -- Reginald, Junior, complain about in that letter in front of you?

A. Well, he complains about the clothes that he wore. And he said that -- oh, he didn't have the clothing that he wanted, but Rick's dressed better than he did.

Q. Okay. Let's talk about that a little bit.

A. Okay.

Q. Did the children ever complain that they were being neglected for Rick?

A. Not to me.

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Q. Okay.

A. Reggie used to say he didn't like him.

Q. When did he say that?

A. When he was young, coming up. And as he got older, he said it again. And I don't know when he was incarcerated a couple of times, he might have told me when he got out he was going to have a fight with him, something like that. I always put it to the fact that he didn't like Rick because Rick wasn't his father. He wanted his dad to be there. I could have been wrong, I don't know. I didn't then I --

Q. Were there ever any occasions of physical violence with Rick that the children witnessed?

A. Yeah, Reggie told me about how he got upset -- well, he -- not upset, he was pissed off with Rick. And he didn't like him because Rick and I had argued and we got into a verbal fight and Rick pulled a gun on me.

Q. Tell us a little bit more about that. What was the circumstances?

A. I don't rightfully remember what the circumstances were, but he pulled a gun on me and had put it to my head.

Q. And did you cry out for your children?

A. I'm not remembering. I might have. When you go through something like that, there's no telling. I

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[p.93]

up to his job one day and they told me he didn't work there anymore. So I'm not sure how long he worked there. Not too long. And so eventually I took the car from him. So .

Q. What was the relationship like between you and Reginald, Junior, at that point in time?

A. It was pretty good. It was okay.

Q. Did you consider yourself to be an affectionate mother?

A. Caring, not a whole lot of affection.

Q. Not a lot of hugs and kisses, kind of stuff?

A. No, I'm not a hug-and-kissy person.

Q. And what was Reggie like?

A. He was caring in his own way, but not huggy/kissy either.

Q. Did he talk much?

A. Only if he wanted to ask for something or needed something. There wasn't a whole lot of conversation.

Q. Did he share much with you about his feelings or anything like that?

A. No.

Q. What kind of holidays did you have, did you celebrate, when they were kids?

A. I've never been big on holidays. Like you said, early off, when I was with their dad, we didn't do holidays

[p.94]

because our religion. And I just never picked up on holidays. There weren't any holiday celebrations actually.

Q. No Christmases or anything like that?

A. No, we didn't do holidays.

Q. Did the kids protest about that any?

A. Yeah, several times.

Q. When Reggie started getting in trouble with the law, do you recall when that was?

A. Yeah, he had a friend that he used to deal with quite a bit. And anyway, a kid reported to the police that Reggie was selling drugs. And so they came to our house, like 3:00, 4:00 in the morning with a search warrant. And came in and -- with guns drawn and fire extinguishers drawn. And I didn't want to know what the fire extinguishers were for. And they said it was because they were told that we had a big dog. And we didn't, we had a puppy. And they went through the house, through the crawlspaces and the dresser drawers and everything looking for drugs. And they didn't find any because Reggie didn't have any drugs in the house.

Q. Okay. How old was Reggie then?

A. About 15.

Q. Was he still in school?

[p.95]

A. Yeah.

Q. When you were married to Reginald Carr, Senior, he had a relationship with his daughter, is that correct, Temica?

A. I've been told that recently.

Q. By Temica?

A. No, by one of the lawyers.

Q. You've never talked to Temica about the relationship with her father?

A. No.

Q. Were you aware of any early sexual activity that Reggie may have engaged in?

A. Yeah, with a neighbor of mine when they were kids.

Q. Can you tell us a little bit more about that?

A. Well, they told me once they got older how the kids were fondling with each other. I don't want to say the kid's name because, you know, this is all going on TV. So -- but they said how they were, you know, experimenting with sex and oral sex and stuff like that.

Q. How old were they?

A. He was just a kid then. A little -- elementary school kid.

Q. Okay. How did you find out about it?

A. Once they got grown, they told me about it. But the

[p.96]

little girl, I caught her once in the backyard with a little boy and told her mom about it.

Q. Do you have any idea what gave them the idea for that stuff?

A. I -- that was the promiscuous little girl, as far as I knew.

Q. How old was the little girl?

A. A year older than Jonathan at the time.

Q. So she was younger than Reggie?

A. Yeah.

Q. And Reggie was in elementary school?

A. Yeah.

Q. At some point in time -- well, did Reggie change schools quite a bit?

A. Yeah.

Q. How many schools do you think he went to before he left school in Dodge City?

A. Maybe six or seven.

Q. Why did he go to so many schools?

A. Mostly because we were bussed and they were changing school assignments. It wasn't mostly because of moving. And so it was mostly because of being bussed.

Q. So every year they changed schools on him?

A. No, they didn't change school every year. I think he -- he started off at kindergarten in the

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Q. Okay. I'm going to hand you what's been marked for identification purposes as Defendant's Exhibit A-17. Ma'am, do you recognize that?

A. Yes.

Q. What is it you recognize that to be?

A. A letter from me to Reggie.

Q. And when was it written?

A. 10-27-01.

Q. Was that letter written in response to one of those critical letters you'd received from Reginald?

A. That's a possibility. I haven't had a time to read it.

Q. Go right ahead. Take a look at it real quick.

A. Okay.

Uh-huh.

Q. Do you recall that letter?

A. Yes, I do.

Q. And was it in response to a letter you received from Reggie, where he was again critical of you?

A. Yeah, I believe it was in response to a letter that he had written me, where he might have told me, where he would have told me, it's not my -- that he did tell me that he was upset with me for one thing or another. And maybe not thinking that there's any love in the family. And I wrote him back to let him know that not

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only do I love him, but he's had family and friends that love him, a grandmother that loves him. We do need to talk more. There are things that I wanted to talk to him about, questions that I needed to ask. Or that I wanted to ask. And if there was anything he wanted to question me about, that I was opening up so he could question me. This letter was to let him know that, yes, I do love you, no matter what.

MR. GREENO: Your Honor, we would move for the admission of Defendant's Exhibit A-17. I will provide a copy for the State.

MS. FOULSTON: No objection.

MR. EVANS: No objection.

THE COURT: It's admitted.

MR. GREENO:

Q. And I know this is hard to do, because it's been such a long time ago and sometimes events are difficult to remember, but do you ever recall a time when Reggie had lived with Eric, Junior, his cousin?

A. No.

Q. Do you recall a time when Reggie got shot with a BB gun by his brother Jonathan?

A. Yeah.

Q. Can you tell us about that?

A. Well, we had just moved to Dodge City and the boys

[p.109]

were outside playing. They initially had been in the open field, I'm not sure which one of them, collecting those bullhead snakes and clowned and playing with them. Reggie did something to Jonathan. Jonathan and the little boy next door had the BB guns. And Jonathan got pissed off at Reggie and told him, you better go in the house, I'm going to pop you with the BB gun. And Jonathan told him by the count of something. And Reggie took his time because Reggie was the big brother and not -- didn't believe Jonathan was going to do it. And Jonathan popped him with the BB gun.

Q. And the BB gun -- did the BB lodge in his head?

A. Yeah, it's still up there.

Q. Have you had an opportunity to visit with Reggie, seen him, talked to him lately?

A. Last -- not last week, but the week before, when I came down for court, I had got a special visit to visit with Reggie.

Q. You are kind of in the dark about this case; is that right?

A. Yeah.

Q. Have you followed any of it in the news?

A. I watched some of it. It's kind of hard. These are my children.

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Q. You were here for the verdict yesterday?

A. Yes, I was.

Q. And you know what the jury's here to do today?

A. Yes, I do.

Q. Is there anything you would like to tell the jury about what you think they ought to do in regard to his sentence?

A. Yes, I would.

Q. Tell them.

MS. FOULSTON: Your Honor, objection to the form of the question and the request.

THE COURT: I will sustain as to the form of the question.

MR. GREENO:

Q. Ms. Harding --

THE COURT: Go ahead.

MR. GREENO:

Q. -- if you were going to request the jury -- if you were going to request the jury a sentence for Reginald, what would it be?

A. Can you speak up?

Q. If you were going to request -- make a request of the jury as to their sentence and their decision about Reginald's life, what would it be?

MS. FOULSTON: Objection as to relevancy.

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THE COURT: I'll overrule the objection.

MR. GREENO:

Q. Answer that.

THE COURT: Do you understand what he's asking? What do you think they should do with their sentence?

A. I believe that my children, Reginald and Jonathan, grew up and were pretty good boys. I believe what happened was a horrible mistake. Things got out of hand. I feel for the other families just as much as I feel for mine. I would ask that their lives would be spared because they're my children and I do love them.

Everybody's hurting now. I'm hurting, the other families are hurting. And we're not supposed to be judges. We're not supposed to judge. And I know the other families are out there and probably just hating me to death right now. And I'm sorry for them. But spare my children. I love them just as much as you would love your children or your grandchildren or your mother, your father. I believe there's good in them, it's just something went wrong along the way.

Q. Anything else?

A. I'd like to tell them that I love them. And I don't know what went wrong, but I love you. I love you both. And I just love you.

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And I'm sorry for everything that happened. I'm sorry. If I did something wrong, I'm sorry. If I -- I don't know. I'm just sorry.

I would like to say I'm just sorry to everybody. I don't know if this was my fault. If it was, I'm sorry.

MR. GREENO: Thank you. I don't have any further questions, Your Honor. I'd like to publish the photographs to the jury at this time if that's possible.

A. Sorry.

THE COURT: Let's finish the witness first.

And, Mr. Evans, let's let you do a direct examination and any cross-examination as that field would be appropriate under the particular subject, otherwise --

MR. EVANS: Yes, sir:

THE COURT: -- direct.

DIRECT/CROSS EXAMINATION

MR. EVANS:

Q. I just want to go a few places with you. Do you have any pictures of Jonathan and his father?

A. No, not that I can recall.

Q. Jonathan was --

A. Well, yeah, I got a -- back home a family photo of all

[p.113]

of us.

Q. You have pictures of Reginald and Reggie.

A. Yes.

Q. Any pictures of Jonathan and his father aside from that family photo?

A. I don't recall any pictures of just the two of them.

Q. Do you think it's fair to say that Jonathan never got a chance to know Reginald, Senior?

A. Yes.

Q. Now, Janice, Jonathan was in grade school when he had that matter come up at Harvey Rice school; is that right?

A. Yes.

Q. You know about that, don't you?

A. Yes.

Q. He was living with you when that happened; is that correct?

A. Yes.

Q. He was seven years old?

A. Yes.

Q. What happened? Tell the jury what happened on that deal.

A. He was in the elementary school and they had a fire drill at school. And a little girl in -- I'm not sure if she was in his class or not, accused Jonathan and

[p.114]

four or five other little kids from kindergarten to the third grade of raping her. And the news media came out to the house and the other little kids in school were teasing all the kids and calling Jonathan names. And we all knew it wasn't true. And so that's how Jonathan ended up in Brownsville, Texas.

Q. The case did achieve some notoriety, it was in the newspaper?

A. Yes, it did. It was in the newspaper.

Q. It was known as the Harvey Rice rape case; is that right?

A. Yes, it did -- it was. And they mentioned all of the children's names, the little boys that were supposed to have done this. And after the little girl's home was investigated, it was found that her and her sister both had been molested, but they had been molested by their stepfather. And they, you know, dismissed any charges against the kids. And the stepfather ended up going to jail. But the little girl had no other way to cry that she needed help, so she blamed other children because she was trying to get help.

Q. This is what I'm interested in. What did that do -- what effect did that have on Jonathan as a seven-year-old being accused of this?

A. It hurt him real bad. He didn't want to go to school.

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And that was the purpose of sending him to go stay with my sister, so he wouldn't have to be there. Because even when he went to school after it had been brought out that it was the little girl's stepfather that was molesting both of the girls, the kids in school were still teasing Jonathan and the other kids. So one of the little boys lived up the street from us and his parents sent him to stay with other relatives also because of the teasing that was going on with the kids.

Q. Why send him to Aunt Phyllis? Why her?

A. Well, I didn't have anywhere else to send him.

Q. How long was he down living with Aunt Phyllis?

A. He stayed with Aunt Phyllis a little over a year. Because when Reggie went down to visit, they both came back together.

Q. They lived in not only Brownsville, but they also moved to Wichita Falls, Texas; is that correct?

A. Yes. Uh-huh.

Q. Phyllis was transferred to Wichita Falls --

A. Yes.

Q. -- and Jonathan moved with her?

A. Yes.

Q. Did you ever go visit Jonathan in Texas?

A. No, I didn't go visit because I didn't have the monies

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to travel.

Q. Eventually Jonathan came back to live with you; is that right?

A. Yes, he did.

Q. Jonathan's relationship with his big brother, Reggie, there's three years difference between them; is that right?

A. Yes.

Q. What was the relationship like as they grew up?

A. They were always real close. Reggie was the oldest brother and Jonathan was the little brother and they were just very close. They played together, they shared rooms together. They were very close siblings.

Q. In your opinion, did Jonathan try to emulate Reggie? Did he look up to him?

A. Yeah. Most younger brothers look up to their big brothers.

Q. Could you see that Reggie was an influence on Jonathan as they grew up?

A. Well, yeah.

Q. There wasn't a man in the house besides Reggie for some of these years; is that correct?

A. Yeah.

Q. And then when Rick Austin came along and you began to live with him, neither of these young men looked to

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Rick Austin as their father; is that a fair statement?

A. Yeah, well, he wasn't their dad.

Q. He didn't try to be, did he?

A. Huh?

Q. Is that right?

A. Well, we -- at first we just were dating and then when we got serious, then he started taking over paying bills and stuff like that. But they both knew that he was not their father.

Q. Reggie was about 19 when he was first sent to prison, when he went to prison in Norton; is that correct?

A. 18.

Q. That would make Jonathan 15 or 16 --

A. Yes.

Q. -- right?

A. Uh-huh.

Q. How did Reggie's going to prison affect Jonathan?

A. It hurt Jonathan because that was his brother. And they had always been close and he didn't want his brother to go to jail. And -- none of us wanted him to go and it really hurt Jonathan because he wanted his brother to be there with him.

Q. Anything happen to Jonathan as his brother was going to prison?

A. Well, yeah, he -- well, he did the antifreeze once.

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He drank antifreeze. And he was -- he was upset that his brother was in jail. And Reggie showed -- well, he was concerned about his brother because Mandy called Reggie and Reggie called the hospital to speak to Jonathan but he couldn't because Jonathan was in intensive care. And --

Q. From drinking the antifreeze?

A. From drinking antifreeze.

Q. He drank the antifreeze to try to kill himself?

A. Yeah.

Q. This was connected with Reggie going to prison?

A. I think it had a lot of things to do with it. He was upset that his brother was gone. He wanted Reggie home with him. They've always been close.

Q. Now, you said something to me a few weeks before this trial started. You said when Reggie went to prison he was Reggie, when he came out he was "Smoke."

A. Yeah.

Q. Do you recall telling me that?

A. Yeah, he -- he was -- he was just different. When he went in, he was a teenager, my child that, you know, you knew. You could tell his dispositions and, you know, his moods and stuff like that. And when he came home, he was just to his-self. Just kind of standoffish.

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Q. You talked to Reggie while he was in prison; is that right?

A. Yeah.

Q. Did he threaten Rick from prison?

A. Yeah, he said he was going to beat him up when he got out.

Q. Did he threaten you?

A. No, he was angry with me behind not visiting the way he felt I should have visited. And --

Q. Let me talk to you about what Jonathan's like when Reggie is around.

A. Uh-huh.

Q. Does Jonathan change when Reggie is around?

A. Well, he likes to do the things and go with Reggie and do things with Reggie. So I would say, yeah, he's a little different when he's with Reggie.

Q. When Jonathan would have been having some interaction with some folks named the Culvers, was Reggie around then or would he have been in prison?

A. Reggie was in jail when he was with the Culvers. Went to visit.

Q. Reggie was in jail when Jonathan was with the Culvers?

A. Uh-huh. Yes.

Q. Did you warn Jonathan to stay away from Reggie when Reggie got out of prison?

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A. Yeah, I told him, don't be running around with Reggie because you're going to end up getting in trouble. And I told him -- I told Reggie too, I said leave Jonathan alone, he don't need to be in no trouble.

Q. Jonathan is the baby of your family, right?

A. Yes, he is.

Q. Is your relationship closer with Jonathan than it is with Reggie?

A. Yes, it is.

MR. EVANS: That's all I have, Judge.

THE COURT: Cross-examination, Mrs. Foulston.

CROSS-EXAMINATION

MS. FOULSTON:

Q. Good morning, ma'am.

A. Good morning.

Q. Do you prefer to be addressed as Mrs. Harding or Mrs. Austin?

A. Janice will be fine.

Q. I will call you by your last name.

A. Okay.

Q. And which would you prefer?

A. It doesn't make a difference. I use Harding also.

Q. Okay. Ms. Harding, as you know, I am one of the prosecutors on this case --

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A. Yes.

Q. -- involving the conviction of your sons for capital murder.

A. Yes.

Q. And you understand that?

A. Yes.

Q. And I want to go over some of the questions that have been asked of you by both Mr. Greeno, as attorney for Reginald Carr, and by Mr. Evans, as attorney for Jonathan Carr. Okay?

A. (Nods head.)

Q. Do you understand?

A. Yes.

Q. Okay. And would you need some water?

A. No, thank you.

Q. Ms. Harding, did you too grow up in the Cleveland area?

A. Yes, I did.

Q. And what did your father do for a living?

A. My father ran a boiler.

Q. He ran a boiler?

A. A boiler, yeah. He was a boiler room technician guy.

Q. That was before they had centralized heat and air; is that right?

A. Oh, yeah.

* * *

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CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

I, Sandra J. Berger, a Certified Shorthand Reporter, and a regularly appointed, qualified, and acting Official Reporter of the 18th Judicial District of the State of

Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in **Case No. 00 CR 2978, *THE STATE OF KANSAS, Plaintiff, v. REGINALD D. CARR, Defendant,*** and **Case No. 00 CR 2979, *THE STATE OF KANSAS, Plaintiff, v. JONATHAN D. CARR, Defendant,*** heard on the 5th day of November, 2002, before the Honorable Paul W. Clark, Judge of Division No. 9 of said Court.

I further certify that at the request of Debra J. Wilson and Rebecca E. Woodman, Capital Appellete Defenders, a transcript of my shorthand notes was typed by me or under my supervision via computer-aided transcription, and that the foregoing transcript Volume 41-A, consisting of 138 typewritten pages, is a true copy of all of the proceedings, all to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Wichita, Kansas, this 21st day of March, 2003.

/s/Sandra J. Berger
SANDRA J. BERGER
CERTIFIED SHORTHAND REPORTER

SANDRA J. BERGER, CSR
Official Court Reporter

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 5, 2002]

THE STATE OF KANSAS,

Plaintiff,

vs.

REGINALD D. CARR,

Defendant.

THE STATE OF KANSAS,

Plaintiff,

vs.

JONATHAN D. CARR,

Defendant.

JURY TRIAL
Volume 41-B

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of

Sedgwick County, Kansas, at Wichita, Sedgwick County, Kansas, on the **5th day of November, 2002.**

APPEARANCES

PLAINTIFF:
Ms. Nola Foulston
District Attorney
Ms. Kim Parker
Deputy District Attorney
Mr. Kevin O'Connor
Assistant District Attorney
Sedgwick County Courthouse Annex
535 North Main Street
Wichita, Kansas – 67203

DEFENDANT REGINALD D. CARR (Appearing in person):
Mr. Jay E. Greeno
Of Counsel, REALS & WEBER
Attorneys at Law
Suite 215
250 North Water
Wichita, Kansas – 67202
and
Mr. John V. Wachtel
KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC
1600 Epic Center
301 North Main
Wichita, Kansas – 67202

DEFENDANT JONATHAN D. CARR (Appearing in person):
Mr. Ronald F. Evans
Mr. Mark A. Manna

Attorneys At Law
Death Penalty Defense Unit
Suite 302
112 Southwest Sixth Street
Topeka, Kansas – 66603

SANDRA J. BERGER, CSR
Official Court Reporter

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CERTIFICATE OF REPORTER 143

SANDRA J. BERGER, CSR
Official Court Reporter

* * *

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me, yeah.

Q. Does he ever accept responsibility himself?

A. Yes.

Q. Does he accept responsibility for any action that he's taken that brings you here today?

A. I haven't had a chance to actually talk to him about this.

Q. You said that when your son Reginald Carr went to the penitentiary that he came out as a different type of person.

A. Yeah.

Q. Can you describe the different person that you saw.

A. He was more standoffish, you know, not really wanting to be around much. He'd come for a little bit and leave. But we attributed it -- a lot of it to, you know, he had been in jail, he went in at an early age and that -- I just don't think jail is a good place for anybody. And being around other people that you don't know, you know, you just become different somehow.

Q. You said that in the -- during the time that your children were being raised in the Cleveland area there were a couple of times that issues of sexual fondling or sexual assault came about; is that correct?

A. Yeah.

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Q. And were those two separate incidents?

A. Yeah.

Q. And one of them involved Jonathan at a school; is that correct?

A. Yes.

Q. And the second one involved Reginald?

A. And Jonathan, I do believe.

Q. Both the boys?

A. I do believe. I'm not quite sure on that.

Q. And are you saying that at that time that -- I believe you said that you thought that the little girl was probably around eight years old?

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. And that you believed her to be promiscuous?

A. Well, yeah, I know she was.

Q. All right. You also said that at a time that your son Reginald had a cousin by the name of Eric; is that right?

A. Yes.

Q. What would Eric's last name be?

A. White.

Q. And I believe you said that at one point that Reginald started to tattoo Eric's name or did tattoo his name

[p.16]

on his arm?

A. Partially. Yeah.

Q. Did he not finish it?

A. No, I don't think he cared much for the feeling of a tattoo.

Q. And did you say that -- I believe that while they were cousins, they weren't really that close?

A. Eric didn't visit my house much and Reggie didn't visit his house much, but when kids are outside playing, they can meet up in neighborhoods because neighborhoods there are small, just like they are here.

Q. Okay. And you also said you didn't remember him going to Eric's funeral?

A. No, he didn't.

Q. Okay. Would there be any reason, then, why you would believe that when Reginald Carr was arrested for this robbery at the Dodge City Community College that he would give the name of Eric White?

A. I have no idea.

Q. Did he feel that close to his cousin, to use his name instead of his own after being arrested?

A. There's a possibility. I don't know how close he feels. That would be like me asking how close you feel to someone. I don't know.

* * *

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* * *

TEMICA HARDING,

called as a witness herein on behalf of the Defendants having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. GREENO:

Q. Okay. Now, could you please state your name for the jury.

A. Temica Harding.

Q. And, Ms. Harding, are you related to Reginald and Jonathan Carr?

[p.65]

A. Yes, those are both my brothers.

Q. Okay. Can you speak up just a little bit?

A. Uh-huh.

Q. Okay. Now, Ms. Harding, how old are you now?

A. I'll be 28 tomorrow.

Q. Excuse me?

A. I'll 28 tomorrow.

Q. Okay. In the -- chronologically in the children in your family, where do you fall? Are you the oldest?

A. The oldest.

Q. Okay. Who is next?

A. Reginald.

Q. And who is next?

A. My sister Regina.

Q. And who is next?

A. And then Jonathan.

Q. Okay. And where were you born?

A. Where was I born?

Q. Uh-huh.

A. In Cleveland, Ohio.

Q. Do you still have family in Cleveland, Ohio?

A. Yes.

Q. Who lives there?

A. My grandmother on my dad's side and my aunt on my mom's side.

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Q. Okay. Who is your grandmother on your dad's side?

A. Dorothy Wiley.

Q. Okay. And your grandmother on your mother's side?

A. Barbara Harding.

Q. And do you have some uncles that live up there?

A. Yes, my Uncle Michael and I think my Uncle Eric, yeah.

Q. Okay. And your father, where does your father live?

A. In California.

Q. When was the last time you saw your father?

A. Probably like, I don't know, fourth or fifth grade.

Q. Excuse me?

A. I think like fourth or fifth grade.

Q. Have you talked to him?

A. No. I tried to call him last night and he wouldn't accept my call.

Q. Okay. When you were born, how old was your mother, do you know?

A. I think my birth certificate is like 14 or 15 years old. I don't know.

Q. When you were first born, where did you stay?

A. I heard I stayed with my grandmother until I was one.

Q. Okay. What was it like in your early childhood, when your mom and dad were still married?

A. At first, I mean, I thought our family was like -- something like the *Brady Bunch,* everybody got along

[p.67]

and we did things like a family and stuff like that.

Q. What kind of things would you do?

A. We would go to the movies together on the weekends and out to dinner, things like that.

Q. Okay. Did you sometimes take family trips?

A. Yeah, we would go out of town. Uh-huh.

Q. Okay. And did there come a time that you recall when there were some problems in the family?

A. Yeah, I think my mother started staying out and not coming home. Yeah.

Q. Okay. Do you recall about how old you were when that happened?

A. It had to have been before I was in the fifth grade.

Q. Okay. And why did it have to be before you were in the fifth grade?

A. Because I went to California when I was in the fifth and sixth grade.

Q. Okay. When they started having these problems, did you see them argue?

A. Yeah, I saw them argue.

Q. Did you ever see them engage in any physical violence?

A. Yeah, I saw my father beat my mother with a stick.

Q. How often would you see them engage in physical violence?

A. I've only seen them twice, but we would always hear

[p.68]

them arguing.

Q. Okay. Did it become pretty frequent?

A. Yeah.

Q. What was the relationship like between Reginald Carr, Senior, and Reggie, Junior?

A. I think -- well, at first, I mean, like I said, we was all like a big family. And then when they got a divorce, I think Reggie always cried -- Reginald always called my father for my father to come get him and things like that. And my father never picked him up or he would tell him he would come and he never showed.

Q. Okay. How did Reginald -- how did Reggie -- I think for the purposes of this questioning I will refer to Reginald as your father; is that all right?

A. Okay. Uh-huh.

Q. And Reggie as your brother, would that be okay?

A. Uh-huh. Yes.

Q. How did Reggie react to that?

A. He would get mad that my dad wouldn't come get him. Because I think he really wanted to be around him since my mother was out doing her thing.

Q. Were you guys pretty much left on your own there for a while?

A. When they were -- before they even got the divorce, my

[p.69]

mother wouldn't come home sometimes. And she would be gone. And when she did come home she would stay there for a couple of days and she would leave back out. My dad took care of us. Or he either took us to my aunt's house.

Q. Okay. What happened after the divorce?

A. After the divorce, I went to California. I went there fifth andr sixth grade.

Q. Why is it -- can I ask you why it is that you went to California?

A. I don't know. My mother just sent me to California.

Q. And who did you live with out there?

A. My Aunt Phyllis.

Q. Okay. And you were there for how long?

A. Two years.

Q. Did your mother ever come out and visit you during that period of time?

A. No, she would write me only when I call her and like be mad at her and tell her that I haven't heard from you. Or if I told her I snatched her picture off the wall or something like that, then she will write me, like, a one-page front letter.

Q. Okay. When is it you came home?

A. After sixth grade.

Q. Okay. And where was home at that point in time?

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A. We lived in Garfield Heights in my grandmother's house.

Q. Okay. Garfield Heights is a suburb of Cleveland, Ohio; is that right?

A. Yes.

Q. Okay. And how long did you live there then?

A. I don't remember because we moved a lot.

Q. Where was it that you moved to?

A. I don't remember, because I know before the divorce we moved in with my mom's godparents, Cortez and Bill, and we lived there for a while and then we lived with my Aunt Bernice. And after I came from California we lived at my grandmother's house. Then we moved to a place on Parkview and Martin Luther King and we moved a lot.

Q. Did you change schools a lot?

A. No, not when I was in the seventh and eighth grade. I stayed at the same school. And in high school I stayed at the same school.

Q. Okay. When you were growing up, what was it like around the house? Were there certain that rules you had to follow?

A. When we were still -- when my parents were still married?

Q. Uh-huh.

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A. Yeah, there was rules we had to follow.

Q. What kind of rules were those?

A. We weren't allowed to sit in the living room or turn the living room television on. Basically we either had to stay in our bedrooms or we had to go in the basement to play.

Q. What about your mom, was she always available for you?

A. Then?

Q. Uh-huh.

A. When they were married?

Q. Uh-huh. Yes.

A. I think so, yeah.

Q. Okay. What happened when they divorced?

A. When they di- -- well, before they divorced, like I said, my mother was gone. And when they finally

got the divorced, I remember Reggie always asked my dad could he come live with him, can he come live with him. And my dad would say yeah. Like my mom and I got a train -- a plane ticket for him to go to California, and the last minute my dad told him no, he couldn't come. And there was no contact between Jonathan and my father. But with Reggie, I think that he always tried to be around my father. And my father always denied it.

Q. Do you recall when your father remarried?

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A. Yeah, he got married someone named Anita.

Q. Did you ever go and visit him when he was married to Anita?

A. I think I went over there maybe one or two times.

Q. Did your father spend any time with you when you went over there?

A. No, we usually went upstairs, like in the attic. They had a family room up there, and played, like, Atari, something like that.

Q. So after the divorce your dad was pretty much out of the picture?

A. Right.

Q. Did you ever have much telephone contact with him?

A. No.

Q. How about Reggie and his father?

A. I don't think so either.

Q. Okay. What kind of discipline did you -- was -- were you subjected to when you were a kid? Who was the main disciplinarian, let me ask that.

A. I think my mother was.

Q. Okay. And how did she discipline you?

A. Sometimes, like if it was Reggie who had to get the whooping, or me, whoever the child was that had to get the whooping, we would lay on the floor, like, with just your underclothes on. And if it was, like,

[p.73]

Reggie, I would have to hold his arms and Jonathan would have to hold his legs. And --

Q. Who made that rule?

A. That was just what we did.

Q. Okay.

A. And then -- I'm sorry.

Q. Go ahead.

A. And then other times when we got whippin's we -- well, myself, I had to take off all my clothes and take the sheets off the bed. And I was, like, placed on the bed like an X, over both corners. And we had to just lay there and get a whopping. And if we got up, then we would get more.

Q. How old were you when this happened?

A. This was before they got the divorce. So --

Q. What about after they got divorced?

A. After they got divorced, yeah, we still got discipline, but it was different. It wasn't the same way. It was more like the cheeks -- my mom took away things that we liked to do.

Q. Were you older then?

A. Yeah.

Q. What about your relationship with your father?

A. I don't have a relationship with him.

Q. Okay. What about back then?

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A. Oh, back then? I just remember -- I mean he treated me like I was his daughter.

Q. Did he ever act inappropriately towards you?

A. Yeah, sometimes he would come in my bedroom and he would be smelling like beer or alcohol. And I remember that he came in my room and got in my sheets and he was rubbing on me and touching on me and then he tried to put his penis in, but it was too big and it didn't go in. And I remember when I was little, I remember when this happened, I just kept telling him that you peed in my bed, you peed in my bed because I didn't know what it was.

Q. Did you tell your mom about that?

A. I never told my mom.

Q. Did you tell anybody?

A. No.

Q. Reggie or Jonathan know about that?

A. I don't -- I don't know to this day if Jonathan know. I think Reggie may know because Reggie pays attention to people.

Q. When your mom was married and you guys were all living together, was there any drinking going on in the house?

A. Yeah. I think my mother -- we were Jehovah Witnesses at the time. And my mother stopped going to the

[p.75]

meetings three times a week. And she would, like, smoke when my dad was gone. And then she would open up all the windows and air freshen the room out. And, yeah, there was drinking.

Q. Did you ever notice anybody drinking to excess?

A. I was young, so I didn't know what excessive was. But, yeah, they would be, like, drunk, I guess, now that I think back at it. So --

Q. Well, later on, when you got older and your mom was divorced, what was life like then?

A. When I came home from California, that's my first time I had met Rick. And when I got home I just noticed that Rick and my mother always stayed in the bedroom. This is when we lived in Garfield Heights. And it was just basically me, Jonathan and Reggie, and they was always in they room with the door closed.

Q. Did your mom cook for you and care for you?

A. When I first got around, yeah. But then eventually I started -- I got a job. And I don't know if I was 15 or 16, because you have to fill out paperwork when you were in school to work if you're under age. And I remember getting my brothers and them clothes, school clothes, and sometimes they would wear my clothes to school. And I prepared all -- most of the meals every evening. Got -- when we were little, before we even

[p.76]

got the divorce, I remember getting my brothers and them ready, like get their clothes out to iron and things like that for them.

Q. Okay. Was your mom available during this period of time?

A. After the divorce?

Q. Uh-huh.

A. Not really. No.

Q. How so?

A. Because we -- it was just me, Reggie and Jonathan. We did everything on our own. After we moved out of Gar- -- out of the house in Garfield, my grandmother's house, I believe we moved to, like, a house around the corner, and my mother was never at home, never at home. It was just me, Jonathan and Reggie there, period.

Q. Did Reggie ever talk about his father?

A. To me?

Q. Yeah.

A. No. I just remember just him saying that he wish Daddy would talk to him. And he wished that our parents never got divorced and all that kind of stuff.

Q. Okay. Were there ever any times when you guys were punished for eating all the food?

A. Yeah, my mother -- if we -- my mother, one time, she

[p.77]

stopped going grocery shopping. And she told us that we had to eat what was ever available in the kitchen. And so we just ate, like, the rest of the green beans or something like that. And we boiled noodles and made like a pasta salad thing. And then I remember one time during this whole process -- during this whole time we was frying some onions and my mother and them came running out the -- my mother and Rick came running out the bedroom, like you all throw on some meat, what you all cooking? And I was like, we just cooking onions. So, yeah.

Q. How long did that go on?

A. I don't know, maybe a week or two.

Q. How old were you then?

A. I was in junior high.

Q. After that was over with, did everything kind of get back to normal?

A. It's never been normal since the divorce, no.

Q. Okay. How so?

A. Because we don't have -- I don't have a relationship with my mother now. I mean, I may go through things now and I really don't talk to my mother, I call my aunt. And right now she still sits in her bedroom. So she treats her grandkids better than she treated us but, no.

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Q. Okay. What about holidays? Did you guys ever celebrate any holidays?

A. No, we -- before the divorce we was Jehovah Witnesses so we didn't expect to celebrate holidays. But after the divorce, that was something that we was looking forward to. And like it seemed like we was always on punishment when a holiday came around. And I just remember one Christmas -- we didn't even have a Christmas tree. We never decorated or nothing. Or had Halloween costumes or nothing like that. But I remember one Christmas my mother just --

(Off-the-record discussion.)

A. I remember one Christmas my mother just went and bought some, like, Monopoly games and things like that. She didn't even wrap them and just set them outside our bedroom door. And when we woke up and opened the bedroom door, we seen them laying there.

Q. Did you ever have a Christmas tree?

A. No, not until my daughter was born. And she's four now.

Q. Okay. Did you ever threaten to run away from home?

A. I threatened to run away from home, yeah, before.

Q. Why did you do that?

A. Because I had told -- I had told my mother once, I had knocked on her door, and I said, told her, I said,

[p.79]

Mom, since you all got the divorce, I don't think you love us no more. And I said, you spend more time with Rick than you spend with us. I said, before you got the divorce, we was -- you know, we did things together like a family. And now we don't do nothing no more. And my mother got mad at me and, like, beat me up in the corner of the house.

Q. Do you recall a point in time when Jonathan left to go live with your aunt?

A. I just know he went to Brownsville, Texas.

Q. Did he --

A. I don't know where I was at.

Q. Excuse me?

A. I don't know where I was living.

Q. You weren't living at home then?

A. I don't remember.

Q. Do you remember him going to Brownsville?

A. I remember him going to Brownsville, yeah.

Q. Okay.

A. But I don't know where I was at. I could have been living with anybody.

Q. Okay. About how old would you have been if Jonathan was seven years old?

A. I had to be 11 or 12.

Q. Okay. But you think you weren't living at the house?

[p.80]

A. I don't know where I was at. I mean, like I said, I had moved before and went to California. And I guess Jonathan probably had left too. Reggie left too. So I mean, I don't remember when we all were shipped off. I don't remember.

Q. Well, let's talk about that. You got shipped off to California?

A. Uh-huh.

Q. And who did you live with out there?

A. My Aunt Phyllis.

Q. Okay. And Jonathan got shipped off to Brownsville, Texas. And he live with your Aunt Phyllis; is that correct?

A. Right. Oh, I think that happened when he was in grade school. I think it was after that Harvey Rice thing. But I don't think my mother ever explained to us or told us where he went or anything like that.

I think she just said that he went to his grandmother's house or something like that.

Q. So how long was it before you all actually lived together in the same house?

A. We haven't been together since -- we haven't been together, the three of us, until Reggie came home from prison.

Q. Where would they ship Reggie off to?

[p.81]

A. Reggie had went to West Virginia.

Q. For the summer?

A. Don't know how long it was. It could have been for the summer or a year.

Q. Did he go more than once?

A. I think he went twice.

Q. Do you recall when you guys moved from Ohio to Dodge City, Kansas?

A. I didn't move with them.

Q. Okay. You stayed?

A. Yes.

Q. Do you remember the circumstances of when they moved?

A. Like I was saying, we was living in that house by ourself. Our mother always stayed down the street because Rick's -- her new husband, I guess, Rick's parents lived down the street and she was always

down the street with him. So I don't know. I think he was down there hiding, like, in the basement from the police. And I think that's the reason why my mother ended up packing, moving.

Q. Do you know why he was hiding from the police?

A. I don't know. I just know that they used to -- him and his cousin used to -- his cousin used to bring, like, cars to our old house. And we had a two-car garage and they would take them into the -- all the

[p.82]

pieces into the garage. And we would be nosy and go look in the window, but it was like tinted windows so we really couldn't see inside the garage window. But when they brought the cars out, it was like a different car.

Q. Okay. When they left Ohio, where did you go?

A. My -- when I -- when they left, I think I was in the 12th grade. And I said I didn't want to go with them because I wanted to graduate with people I knew. So my mother just left me with people that she knew, some guy named Patrick. And I had never met them until she packed up my stuff and took me over there.

Q. Okay. Are you familiar with the relationship that Reggie had with his cousin Eric, Junior?

A. Yeah, they were real close.

Q. Okay. And how close were they? Can you describe for me a little bit about how frequently they saw each other.

A. Probably every day. They were together every day. They did everything together.

Q. Did Eric, Junior, come over to your house?

A. Yeah, he was over there frequently.

Q. Frequently?

A. Uh-huh.

Q. Did Reggie ever go over to his house?

[p.83]

A. Yes.

Q. Would your mom know that Eric, Junior, would be over there?

A. Some -- well, most of the time she didn't because she stayed down the street with Rick. So she didn't know about the company that we had coming in and out of the house.

Q. Okay. Was Reggie getting in any trouble at that period of time?

A. I don't remember him getting into trouble, no.

Q. Okay. Was he doing things he shouldn't have been doing and not getting caught?

A. Not that I know of.

Q. Okay. Do you recall what happened to Eric, Junior?

A. Yes.

Q. What?

A. On my birthday, [REDACTED], 1993, he got shot execution-style in his head.

Q. And where was that at?

A. In Cleveland, Ohio.

Q. Where was Reggie and Jonathan at that point in time?

A. In Dodge City, Kansas.

Q. Do you recall talking to Reggie about that period of time?

A. I -- he knew about it. And I think he wrote poems and

[p.84]

drew pictures and things like that for my cousin. And I just know that he had, like, put a tattoo of my cousin's name on his arm because he was real hurt over that.

Q. Okay. Do you recall when Reggie went to prison?

A. I was in Cleveland and I worked for a company called Sun TV. And my mother had called me and told me that he went to prison.

Q. What did you do?

A. What did I know about it?

Q. What did you do?

A. I just started crying at work and they let me go home early.

Q. Did you ever go down and visit Reggie?

A. When he was incarcerated, I think I probably went maybe twice.

Q. Okay. Do you have a daughter?

A. Yes, I do.

Q. What's her name?

A. Sier (phonetic) Harding.

Q. And how old is Sier?

A. She's four.

Q. Did she have any contact with Reggie?

A. Just when he came home -- she went to visit him once in -- I think he was in Norton. And she got in

[p.85]

because we had made like my mother was the baby's mother. So that's how she got in; otherwise, she wouldn't have got in. And she visited him once. And then when he came home, she was around him. When he came home from prison.

Q. Did they develop a relationship?

A. Yeah. Yes, they did.

Q. I'm going to hand you what's been marked for identification purposes as Defendant's Exhibit A-31 and ask if you can identify that. Do you recognize that?

A. That's a picture of me.

Q. Okay. And who drew that picture of you?

A. Reggie.

Q. Do you know when it was that he drew that picture?

A. Since he been in the Sedgwick County.

Q. Is there a date on it?

A. March 4, 2002.

Q. Does he draw a lot?

A. All the time. And write poetry.

Q. How long has he been doing that?

A. He drew when we were little. We all drew. They drew people and I would draw cartoons -- more cartoons because I wasn't a people person like they are.

Q. Did Reggie ever complain about your mother?

[p.86]

A. He always would say that he thought that my mother didn't like him because he was the dark one of the family.

Q. Okay. Did he ever complain about her failure to visit him in jail?

A. Yeah. He told her that she lived here in Kansas and she -- she hasn't came up there to see him, maybe three, four, five times. I don't know how many times. And his wife Mandy went up there every weekend. And he would say that you can catch a ride with Mandy, but she never came.

Q. Did you have much contact with Reggie just before he went to prison?

A. Yeah.

Q. What was he like?

A. Before he went to --

Q. Yes.

A. Me?

Q. What was Reggie like before he went to prison?

A. He was nice, he was funny. He -- they didn't do too much. They stayed -- most of the time they stayed in the house and played Nintendo. And we played outside, things like that.

Q. Did you -- and you saw him when he got out of the prison; is that right?

[p.87]

A. Did I saw him when he got out? Uh-huh. Yes.

Q. What was he like then?

A. He was to his-self. He just seemed -- before he even got out, I would have conversations with him on the phone, he just seemed like he completely changed. He was -- he was mean on the phone and would say stuff, like -- like, I'm going to beat you all up when you all come home. Or I want to mess with Jonathan's girlfriends and stuff like that. But he was -- I think he was more mean when he came home.

MR. GREENO: Your Honor, I would move to admit Defendant's Exhibit A-31.

MS. PARKER: No objection.

MR. EVANS: No objections.

THE COURT: It's admitted.

MR. GREENO:

Q. Temica, have you tried to maintain a relationship with your brother since this happened?

A. When he first went to the county, I used to visit him.

Q. Have you lately?

A. I haven't seen Reggie in probably like a year and a half.

Q. And why is that?

A. Because he was mad at me for the guy that I was talking to.

[p.88]

Q. That's the man you were dating?

A. Yeah.

Q. And you've grown apart since then? And you've grown apart since then?

A. Right. Yes.

Q. Temica, do you have any idea what you would like the jury to do in regard to Reggie's sentence?

MS. PARKER: Your Honor, I object to the relevancy of what she thinks.

THE COURT: I'll sustain the objection.

MR. GREENO:

Q. How do you think it will affect you if Reginald Carr is executed?

MS. PARKER: Objection, relevancy.

THE COURT: I'll sustain the objection.

A. You waiting on me?

MR. GREENO:

Q. I'm thinking of a question here. Just a second.

A. Oh.

Q. Are you going to try to maintain a relationship with your brother?

A. Yeah. Yes.

Q. How do you anticipate you'll do that?

A. I have to write him.

MR. GREENO: I don't believe I have any

[p.89]

further questions. Thank you.

THE COURT: Thank you.

Mr. Evans.

DIRECT/CROSS-EXAMINATION

MR. EVANS:

Q. Temica, I would like to talk to you a little bit about the relationship that Reggie and Jonathan had as they grew together. Did Jonathan seem to look up to Reggie?

A. Yes, he did.

Q. Did he follow Reggie?

A. Yes, he did.

Q. Reggie was different when he came out of prison, that's what you just told Mr. Greeno, right?

A. Yes, sir.

Q. Did you warn Jonathan that you got to stay away from Reggie?

A. I told him all the time.

Q. He didn't listen to you, did he?

A. No, he didn't.

Q. You visited -- you visited both of them since they've been in the Sedgwick County Jail; is that right?

A. Yes.

Q. Jonathan more than Reggie?

A. Yes.

[p.90]

Q. Did you have a conversation with Reggie about what happened that night in the snow?

A. Reggie really never talked about it that often. He really didn't say anything about -- about this case.

Q. Did Reggie tell you he was the one that shot those people?

A. Yes.

Q. Did he tell you he shot all of them?

A. I don't remember the conversation.

Q. If the jury saw fit to spare Jonathan's life, would you maintain contact with him while he's in prison?

A. Jonathan?

Q. Yes.

A. Yes.

MR. GREENO: That's all I have, Judge.

THE COURT: Thank you.

Cross-examination, Ms. Parker.

CROSS-EXAMINATION

MS. PARKER:

Q. How old are you again, Temica?

A. I will be 28 tomorrow.

Q. 28. And how much older are you than Reginald Carr?

A. Three years.

Q. And how much older are you than Jonathan Carr?

A. Six years.

[p.91]

Q. And I think some of the last things you just said is that you took care of the boys in your relationship with them?

A. Yes.

Q. And some of the things you've described, it was you, not them, that was sexually molested; is that right?

A. To my knowledge, I know about myself, I don't know about them.

Q. It would be a surprise to you if you learned that?

A. Right. Since this case has started, I've heard things that I didn't know had happened.

Q. Well, most the time it sounded like they were in your care. These boys were in your care.

A. Yes, I took care of them when my mother was still there.

Q. And I think you described at first that your family before the divorce was kind of like the *Brady Bunch?*

A. That's correct.

Q. But then you also described that the physical spankings where you had to hold each other down ended after the divorce?

A. No, that was during the divorce -- during their marriage, when we got whoop- -- spankings like that.

Q. And then those ended, and after the divorce the discipline was in the nature of restrictions?

[p.92]

A. That's correct.

Q. And would it be fair to say that you've -- that you've suffered the same parental environment that your brothers grew up in? Do you have the same mom?

A. Yes, we have the same mom.

Q. Did she treat you special? Did you get all the clothes?

A. I provided for myself.

Q. You provided your own clothes?

A. Yes.

Q. You even provided them for your brothers?

A. Yes, we shared clothes. When I bought clothes, I would buy them clothes as well. Maybe one or two outfits. And they also shared the clothing that I wore.

Q. You gave them love?

A. Yes.

Q. Is that what they gave back to you?

A. Yes.

Q. You said that Reginald was nice before he went to prison?

A. Yes.

Q. Does that include how nice he was to the woman at the book store with the *Jason* mask, telling her he was going to shoot her and took all her money?

[p.93]

A. I don't know anything about that. I stayed in Ohio at the time.

Q. Does it include the fights he was in?

A. When he was in junior high? I stayed in Ohio. I'm just now learning about the things that got him put in prison when I watched the news last night.

Q. So maybe you don't know whether he was nice?

A. He was nice when we were younger, yes.

Q. When did he stop being nice?

A. Well, like I said, they moved away. So we didn't have any more communication at the time.

Q. And that was when?

A. When I was in 11th -- going to 12th grade.

Q. And how old was Reginald then?

A. I guess I must have been 17, so he probably was 14. 13 or 14.

Q. And where did he live?

A. When -- before they moved? We all lived together.

Q. Where did he live when you separated?

A. Him -- he went to Dodge City with my mother.

Q. And that's where your Aunt Phyllis Harding lived --

A. Yes.

Q. -- the doctor?

A. Yes.

Q. Has your aunt provided for -- for you?

[p.94]

A. She gave me $800 once to buy a car. And if I call her and ask her for something, then she does it for me, yes.

Q. She gives money to your brother Reginald Carr to bail him out?

A. Yeah, she did.

Q. How many times?

A. I don't know how many times. But I know --

Q. Did he pay her back?

A. Has he paid her back?

Q. Uh-huh.

A. We've never paid her back. And she's never asked us to pay her back.

Q. Did she -- did she provide clothing for your brothers?

A. When they lived in Dodge, I don't know because I lived in Ohio.

Q. It was when they were in Dodge they began getting into serious trouble with the law?

A. That's correct.

Q. Both of them?

A. That's correct.

Q. Jonathan and Reginald?

A. Yeah, I think Reggie got in trouble first.

Q. Both of them had a number of arrests?

A. See, I don't know about all that because it was never

[p.95]

told to me because I stayed in Ohio.

Q. So your opinion that Reginald Carr is nice and your brother Jonathan Carr is nice, you don't really know what they were doing for a number of years; is that correct?

A. Once they moved to Dodge, that's correct.

Q. So everything they did since they've been in Dodge has no bearing on your opinion about them being nice?

A. Right, because I didn't know what they were doing.

Q. How about the drugs, the possession of methamphetamine by your brother Reginald Carr?

A. I didn't learn nothing about that until last night when I watched the news.

Q. How about the diversion in Gray County, Kansas, for aggravated indecent solicitation of a child, his first offense in '94, do you remember that?

A. That's -- this is my first time hearing anything about that.

Q. So those are the things that you wouldn't have known about in determining whether or not he was nice?

A. No, because those are the things that happened once he moved to Dodge City, if they -- if that's what happened.

Q. His cousin that he was close to, Eric White, after he was deceased, in Dodge, shot in the head, you know

[p.96]

your brother Reginald Carr used his name as an alias when he was arrested, did you know?

A. No, I didn't.

Q. This tattoo that your brother Reginald Carr has, is it a complete name of Eric?

A. I think it just -- I don't know, I think it just say "Eric," I don't know.

Q. Okay.

A. Or "E." I don't know. I don't remember.

Q. Does he have any other tattoos?

A. I don't know if he does.

Q. Have you ever seen that *Jason* mask that Reginald used? Did you ever see that in your home?

A. I didn't live in Dodge. I stayed in Ohio.

Q. Were you in Ohio when Jonathan ran off without court permission to Ohio?

MR. EVANS: Your Honor, again I'm object to this line of inquiry. It doesn't go to any aggravator. Certainly it wasn't opened up by anything I asked her on direct examination.

THE COURT: I'll overrule the objection.

MS. PARKER:

Q. Did he --

A. I'm sorry.

Q. Did he come to you?

[p.97]

A. Did he move to Ohio with me?

Q. Uh-huh.

A. Yes, he did.

Q. How many times did he come up to Ohio?

A. Oh, I think twice.

Q. Did you care for him?

A. Yes, I did.

Q. Did he work?

A. No, he didn't. He just went to school.

Q. Did your brother Reginald Carr work as far as you know?

A. Did he ever work? Yes, he's had jobs before.

I'm sorry, Jonathan did have a job when he was in Cleveland. He worked at McDonald's down the street from our house.

Q. Did they ever have problems with their probation because they failed to keep jobs?

A. I don't know anything about that.

Q. Was Jonathan arrested for a carjacking in Ohio?

A. Yes, I think. I don't think it was a carjacking. I don't -- I mean is it carjacking when you -- some people are in the car and they do something?

Q. Right. He come up to the guy at a Quiktrip with the gun?

A. I don't know if it was a Quiktrip. I don't know if he

[p.98]

had a gun or not. I just know they had reported that he had stole a car.

Q. Do you remember that the victim was in the vehicle?

A. I don't remember that. I remember that -- it was told to me that he was in the store and he came out and just got in the car and know that the people had left -- the people had went into the car, whoever the person was.

Q. Do you recall that Jonathan was accused of pushing the man?

A. No.

MR. EVANS: Your Honor, renew my objection. I would ask for a continuing objection about this line of questioning. It doesn't go to any aggravator, it's uncharged, unconvicted conduct. Objection.

THE COURT: I will overrule the objection. I'll give you a continuing objection to the line of questioning, though.

MS. PARKER:

Q. Did -- when you were in Ohio, did you have contact with your grandmother, Barbara Harding?

A. Yes.

Q. So you were exposed to her?

A. Yes.

Q. Exposed to your mother and the kind of raising that

[p.99]

she -- that she involved herself in regarding your parenting?

A. Yes.

Q. And you have a job?

A. Yes.

Q. And we saw pictures of your home on Poplar.

A. Yes.

Q. You keep it very clean?

A. Yes.

Q. Who taught you to do that?

A. My mother kept her house clean.

Q. Did your mother work?

A. No. Did she work?

Q. Did she have a job?

A. No, my father took care of us.

Q. So when your mother came in here -- you don't remember her having jobs? She testified that she'd had jobs.

A. After the divorce, I believe she did keep a couple of jobs here and there. That's when she was with Rick. But before the divorce, she didn't work.

Q. But after the divorce, as a single mom she worked?

A. Yeah. She kept maybe one or two weeks.

Q. It would have been her that paid for the green beans and the fried onions?

A. Yes.

[p.100]

Q. And the pasta salad --

A. Yes.

Q. -- that you had to eat?

A. Yes.

Q. When your mother was here, she said that Regina, your sister that died of leukemia when she was two -- is that right? Is that how old she was when she died?

A. I don't know how old. I just remember waking up and she was on my floor.

Q. She said something about -- now, Regina would have been how much older than Reginald?

A. She was underneath Reggie.

Q. She was younger?

A. Yes.

Q. How much younger?

A. Like a year, I guess. I don't know.

Q. Your mom had said that she used to be mean to Reginald and point her finger at him.

A. Yes, sir.

Q. Do you remember that?

A. Uh-huh.

Q. Did she point her finger at you too?

A. She only did that to Reggie.

Q. And that was when she was two?

A. Right.

[p.101]

Q. Your mom told us about a time when your brothers got involved with a little fondling with the neighborhood girl that was promiscuous. I think the girl was eight and she was a year older than your brother Jonathan. And so Reginald would have been a few years older than she was. Do you remember that incident?

A. I guess you're referring to Amber? Yes.

Q. Amber?

A. Uh-huh.

Q. And so they were involved -- both your brothers were involved in fondling Amber?

A. Yes.

Q. Or she was fondling them?

A. Yeah. Vice versa, yeah.

Q. Because she was promiscuous?

A. Yes.

Q. So she was eight and Reginald would have been how old?

A. I don't know because I need to know a year so I can figure out.

Q. Well, let's see, Jonathan was seven, according to your mom, the girl was eight, Jonathan is three years younger than Reginald?

A. I think two.

Q. Two years younger than Reginald?

A. Yeah.

[p.102]

Q. So Reginald would have been nine or ten?

A. Right, nine.

Q. In the year 2000, Jonathan Carr came to live with you in Wichita?

A. Yes, he came for -- he actually didn't come to live. He just came to watch my daughter until I found daycare.

Q. Okay. And was he employed then?

A. No.

Q. You let him stay at your home?

A. Yes.

Q. Did you let him use your vehicle?

A. Yes.

Q. Who paid for your vehicle?

A. I paid for it.

Q. Did Jonathan have a vehicle?

A. No.

Q. Did Reginald come to town?

A. Yes.

Q. Where did he stay?

A. He either stayed with -- I didn't know her name was Stefanie at the time, but he either stayed over there or sometime when I wake up in the morning he would be, like, laying on my couch or in Jonathan's room asleep.

Q. So you allowed him -- Reginald to stay at your home as

[p.103]

well?

A. Yes.

Q. And was Reginald employed?

A. No.

Q. Now, there's been testimony that one of the things Reginald -- well, your mom said -- she didn't indicate whether he did that here, but that in the past he had -- her home had been raided in Dodge City for drugs because the police had been given some information about Reginald selling drugs.

A. I heard about that.

Q. Did you know that information when you allowed them to stay in your home?

A. Yes.

Q. You said that after Reginald Carr got out of prison, that's when he got mean?

A. Right. He was mean while.

Q. He was mean to you?

A. He was mean while he was in prison. I mean through our conversations over the phone.

Q. So before prison he was nice to you. You don't know about anything he did to anyone else during that time?

A. Right.

Q. And then while he was in prison and after, he became mean to his sister; is that right?

[p.104]

A. He was mean to everybody. Before he -- before he went to prison, he was just like a regular kid, a regular boy, playing outside and playing Nintendo.

Q. Ms. Harding, was he mean to you?

A. He was mean, yes, to everybody.

Q. To you?

A. Oh, to me?

Q. To you.

A. He would just say mean things to me, yes.

Q. And are you the same sister that helped put clothes on his back and make sure he was fed when he was a child when your momma was gone?

A. Yes. He's still my brother regardless.

Q. Yes, he is. He was mean to Jonathan then, too, I think you said. He said he was going to mess with Jonathan's girlfriends?

A. Right.

Q. What does that mean, "mess with"?

A. It could have been like a joking thing because that's how we always took it as.

Q. Is that sexual?

A. I don't think it was sexual, no.

Q. Is it physical?

A. No, I think -- I mean, because when you a teenager and you grow up, I mean you may have one girlfriend and

[p.105]

then your brother may -- I mean like play jokes on the girl to see if the girl's to be faithful to you or not, things like that.

Q. Did he tell you he was going to beat you up over the phone?

A. Yeah, he would joke around like that over the phone.

Q. I'm sorry, I thought you said he was being mean. I didn't know he was just joking.

A. He was being mean, however, we took it as a joke when he would say sarcastic things like that because when he came home he never did none of the things that he said he was going to do. He just always seemed negative over the phone.

Q. So when he came home from prison, then, he was nice again?

A. When he came home from prison he never carried out those things that he said that he would do over the phone.

Q. He never beat you up?

A. No.

Q. He never messed with Jonathan's girlfriends?

A. No.

Q. How many girlfriends did Jonathan have?

A. When he lived in Wichita he had -- I know he had one main girlfriend, but I mean he had a lot of female

[p.106]

friends.

Q. You had talked about whether or not you had visited Reginald Carr while he's been in custody. How many times did you say you visited him?

A. This was in the beginning. I didn't visit him that much because I was mad about this whole situation.

Q. Uh-huh. Why were you mad?

A. Because I was just thinking about what happened and we was just all trying to put -- piece stuff together.

Q. Aren't you still mad?

A. Am I still mad?

Q. Aren't you still mad?

A. I'm upset because it's only three siblings and I'm going to be the only one left. Yes, I'm still upset.

Q. You still have your job?

A. I don't work for my job anymore. And my apartment got vandalized because of this case. So I'm --

Q. Did you move?

A. I moved to Dodge City, but I have this apartment complex all on my credit now because of this.

Q. And you didn't do any of it, did you?

A. No, I didn't.

Q. But you've suffered consequences of --

A. Yes.

Q. -- the actions of the brothers you took care of?

[p.107]

A. Uh-huh. Yes.

Q. When your brothers were here in Wichita, did they have clothes?

A. Yes.

Q. Do you have a television in your house?

A. Yes.

Q. Have more than one television in the house?

A. I only had one at the time.

Q. Did you restrict your brothers to a room that didn't have a television?

A. I just told them that my daughter's room, that they could have that room. And, no, I didn't have a television in it.

Q. Could they watch television in your house?

A. They can watch it whenever they wanted to. I wasn't a television person.

Q. Could they listen to the stereo in your house if they wanted to?

A. Yes. They just was -- I just told them not to turn it up loud. And when they finish with it to turn it off so that when you turn it back on the speakers wouldn't burst.

Q. Do you have a computer your house?

A. Yes.

Q. Could they use -- could they have used your computer

[p.108]

if they wanted to use a computer?

A. If they wanted to, but I don't think they knew too much about computers.

Q. You were working, did you have food in your house?

A. Yes.

Q. Would you let your brothers eat at your house?

A. Yes. I would try to cook enough to feed everybody, but I never really cooked enough. So they always ended up going out after they ate at my house too.

Q. Where did they get money to go out?

A. I never questioned where they got it from. I just assumed that Reggie's girlfriend gave him money. And then maybe my aunt sent him money.

Q. And your aunt did send him money, didn't she?

A. She has, yes.

Q. To both Jonathan and Reginald?

A. Yes.

Q. Did you give them any money?

A. I wrote Reggie once a check. I think it was for like $50.

Q. As far as you know, when Reginald had to stay over or did stay over at Stefanie Donley's, she would give him food if he needed it?

A. Yes.

Q. Your brothers had these leather coats. Did you see

[p.109]

them with those leather coats?

A. Yes.

Q. Did you buy those for them?

A. No.

Q. Who paid for the leather coats that they wore around?

A. I don't know. They had them for a while.

MR. GREENO: Your Honor, I'm going to object. This is outside the scope of direct examination and I don't see the relevance.

MR. EVANS: I join.

THE COURT: I'll overrule on both grounds.

A. I don't know who paid for them. Could have been my aunt. They had them for a while.

MS. PARKER:

Q. In your home -- there is a picture of the room that you let your brothers stay in.

A. Uh-huh.

Q. And it appears that there are other coats and other folded clothing items in that room.

A. Right.

Q. Were those yours or were -- did they belong to your brothers?

A. They belonged to them.

Q. So when it got cold outside, they had something to wear?

[p.110]

A. Yes.

Q. Do you have remotes that went with your TV?

A. Yes.

Q. So if they needed to turn it on from a sitting position, they could use your remote?

A. Yes.

Q. Did you keep contact with your mother while you were living in Wichita?

A. I kept contact only because of my daughter. She -- that was her granddaughter.

Q. And so when you kept contact with that person, did you call her -- for that reason, did you call her frequently?

A. Yes.

Q. So despite your mother's long absences while you were a child, as you've described, you have a desire to have your daughter involved with her?

A. Right. Because she -- like I said, she treats the grandchildren different. Better.

Q. And you told us that your brother Reginald Carr said that he personally shot these people?

A. I believe I heard him tell me something like that. I don't remember.

Q. You don't remember?

A. Right. I believe he told me something like that, but

[p.111]

like when he asked me who he shot and all that, I don't remember who was, you know, shot by who.

Q. And is he the one that during jury selection you brought your daughter up to see?

A. When did I bring her up? Into the courtroom? Oh, yeah.

Q. A couple of times.

A. Yeah, yeah, when we set in the middle there, yes.

Q. And was this after he told you he personally shot these people that you brought your young daughter here to see him?

A. Yes.

MS. PARKER: Just a moment.

MS. PARKER:

Q. You had said that you had kept contact with your mother while you were here in Wichita. Did you keep contact with your mother while you were in Ohio and she and your brothers were in Dodge City?

A. Not -- no, it was very rare.

Q. Did you have contact with her while you were in Ohio regarding the problems your brothers were having?

A. No, she would just call me and, like, tell me Reginald went to jail. And I never really knew the reasons why they were in trouble or anything like that. I didn't know until I saw the news last night.

[p.112]

Q. You didn't know they were in trouble?

A. No, I didn't know the reasonings behind why they were in trouble until I saw the news last night.

Q. So you have since learned about the threat to the individual at the Community Corrections about putting a pencil through her throat?

A. Right. I saw that on the news last night.

Q. That was your brother Jonathan?

A. Right. That's what they said.

Q. That is not something that you knew prior to that?

A. No.

Q. So in other words, a lot of your impressions of your brothers, you don't have all the information and you're just now learning it?

A. When it comes to the reasonings why they were in trouble or going to jail or something like that, no, I didn't know anything about that.

Q. All the times that you visited Jonathan Carr while he's been in the jail --

A. Yes.

Q. -- you never discussed his history?

A. What do you mean *history*? His life as a kid?

Q. His life as a kid which would include his history with law enforcement and other people that he -- he's had problems with.

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A. No.

Q. What kind of history did you talk about?

A. We didn't talk about a history, nothing like that. It was -- me and his conversations were always like what did you do today or what's going on in Wichita, how is your daughter, things like that. We really didn't talk about our past.

MS. PARKER: Thank you, Ms. Harding.

* * *

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CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

I, Sandra J. Berger, a Certified Shorthand Reporter, and a regularly appointed, qualified, and acting Official Reporter of the 18th Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in **Case No. 00 CR 2978, *THE STATE OF KANSAS, Plaintiff, v. REGINALD D. CARR, Defendant,*** and **Case No. 00 CR 2979, *THE STATE OF KANSAS, Plaintiff, v. JONATHAN D. CARR, Defendant,*** heard on the 5th day of November, 2002, before the Honorable Paul W. Clark, Judge of Division No. 9 of said Court.

I further certify that at the request of Debra J. Wilson and Rebecca E. Woodman, Capital Appellete Defenders, a transcript of my shorthand notes was typed by me or under my supervision via computer-aided transcription, and that the foregoing transcript

Volume 41-B, consisting of 142 typewritten pages, is a true copy of all of the proceedings, all to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Wichita, Kansas, this 21st day of March, 2003.

/s/Sandra J. Berger
SANDRA J. BERGER
CERTIFIED SHORTHAND REPORTER

SANDRA J. BERGER, CSR
Official Court Reporter

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 6, 2002]

THE STATE OF KANSAS,)
)
Plaintiff,)
)
vs.)
)
REGINALD D. CARR,)
)
Defendant.)
)
THE STATE OF KANSAS,)
)
Plaintiff,)
)
vs.)
)
JONATHAN D. CARR,)
)
Defendant.)

JURY TRIAL
Volume 42

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of

Sedgwick County, Kansas, at Wichita, Sedgwick County, Kansas, on the **6th day of November, 2002.**

APPEARANCES

PLAINTIFF:
Ms. Nola Foulston
District Attorney
Ms. Kim Parker
Deputy District Attorney
Mr. Kevin O'Connor
Assistant District Attorney
Sedgwick County Courthouse Annex
535 North Main Street
Wichita, Kansas – 67203

DEFENDANT REGINALD D. CARR (Appearing in person):
Mr. Jay E. Greeno
Of Counsel, REALS & WEBER
Attorneys at Law
Suite 215
250 North Water
Wichita, Kansas – 67202
and
Mr. John V. Wachtel
KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC
1600 Epic Center
301 North Main
Wichita, Kansas – 67202

DEFENDANT JONATHAN D. CARR (Appearing in person):
Mr. Ronald F Evans
Mr. Mark A. Manna

Attorneys At Law
Death Penalty Defense Unit
Suite 302
112 Southwest Sixth Street
Topeka, Kansas – 66603

SANDRA J. BERGER, CSR
Official Court Reporter

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* * *

[p.8] [*Cont. Direct Examination of David Preston, M.D. by Mr. Greeno*]

There are -- most of the work, however, is done for diagnostic purposes, helping the clinician identify disease process and how far it has progressed. We have work in -- with oncology, that is for cancer work, for the treatment -- the treatment of thyroid cancer and the treatment of overactive thyroid glands. Diagnosis includes a good bit of work in the brain, but with the PET imaging, as well as with what's called SPECT imaging, which is single photon emission computed tomography imaging, bone scanning, lung scanning, looking for pulmonary emboli, looking for silent infarctions, miocardia infarctions using radioactive tracers. That has been a big success story in the last ten years or so.

Q. Have you published?

A. Yes.

Q. What have you published?

A. I -- it's in my CV I have probably six or seven book chapters and probably some 60 or 70 exhibits. Scientific exhibits at the Society of Nuclear Medicine meeting over the past 30 or 40 years or so. And also at the Radiological Society of North America, which is the big international meeting in Chicago. Exhibits, as well as book chapters, individual papers on the early detection of breast cancer using a radio tracer

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that I have been involved in developing. And -- but in most organ systems, the heart, the lung, the brain. Bones. Numerous publications. Perhaps 60 or 70.

Q. How long have you been involved in nuclear medicine?

A. Since 19- -- since the summer of 1963 actually. Almost 40 years.

Q. Have there been a lot of developments recently in that area?

A. Yes, there have been.

Q. You mentioned PET imaging.

A. Yes.

Q. Can you tell us what that is.

A. PET imaging is a -- it is a special technique which uses positrons. That's what the "P" in the PET stands for. PET stands for positron emission tomography. And there are -- positrons are actually antimatter. And those of you who watch -- have ever seen *Star Trek*, you know that antimatter is what makes the *Starship Enterprise* run.

Well, there really are things like that. And in fact, there are certain radioactive atoms that decay in a specific way that -- where the nucleus emits a positron. And this finds a real world electron and the positron and the electron annihilate themselves and turn into basically two high energy

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x-rays which go off in opposite directions. And the PET detection is done by placing detectors 180 degrees apart, or ideally in a ring around the patient or subject, or whatever it is you're looking at, and recording the data, the position of where these -- these things come from, where these -- where these positron/electron interactions occur. And you are then able to plot back to -- in space to where this thing occurred.

Now, that may sound a bit far-out. But actually what happens is, especially in brain PET imaging with fluorodeoxyglucose, is that you take a molecule that is very similar to glucose and you stick on it a fluorine-18 atom and you then inject it into the patient. And this material goes to wherever there is metabolism. And the three areas that will go to primarily will be the brain, the heart and the liver. You'll see some go down in the kidneys and so forth, but it also then goes to various cancers that may appear in the body. And you're able to see in the brain strokes as areas of decreased metabolism and you're able to see areas of brain tumor, you're able to see places in the brain that are not working.

Q. So is PET scan technology generally used to detect brain abnormality?

* * *

[p.35] [*Cont. Voir Dire Examination by Ms. Foulston*]

of the University of Kansas Medical Center talked about the -- the remarkable PET images that are computer noninvasive scans; is that correct?

A. Yes.

Q. And it is talking about the technology; is that right?

A. Yes.

Q. And it in this article in no way suggests that it is for use in forensic evaluation of individuals charged in capital cases; is that correct?

A. Yes, that's correct.

Q. And again, you are called upon here to explain your findings on Reginald and Jonathan Carr?

A. Yes.

Q. And you have told us that it is the PET scan is not accepted to predict or explain criminal behavior; is that yes or no?

A. Well, that's what you have said.

Q. You said no twice. I guess my --

A. Okay. I guess I will say no again, then.

MS. FOULSTON: All right. Your Honor, I object. It becomes not relevant when the witness has identified the examination as not accepted to predict or explain criminal behavior. And that he has been called upon to explain criminal behavior, that which the PET scan cannot do and is not accepted, as the

[p.36]

doctor said, in the forensic area to predict or explain criminal behavior. Therefore, becomes not relevant.

THE COURT: Thank you. I will find that Dr. Preston is qualified to render an opinion in nuclear medicine and endocrinology, diagnostic technique in cancer and the other areas that he has talked about in diagnostic technique that's been set out. The -- I will further find that he's qualified to render an opinion in the technique of the PET imaging and the reading and use as a diagnostic technique in those areas in which he's qualified.

I'll find that he's not qualified -- nothing has been shown to qualify his rendering opinion in a forensic determination of behavior. Those accused of crime based on images made with a PET test of their brains.

MR. GREENO: Thank you, Your Honor. May I proceed?

THE COURT: Yes, sir.

MR. GREENO: Thank you.

CONTINUED DIRECT EXAMINATION

MR. GREENO:

Q. Dr. Preston, let's say as a diagnostic tool, we're talking about the PET scan here, would a common

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scenario be that an individual has given us a battery of neuropsychological testing and an individual that is evaluating that finds -- makes certain findings, would they -- would they ask for a PET scan to try to verify the results of their testing?

MS. FOULSTON: Objection, Your Honor, to the form of the question.

THE COURT: Compound. I think there's three questions there.

Did you understand it or would you rather have him do it one at a time?

THE WITNESS: I think we better do it one at a time.

THE COURT: Let's do it one at a time.

MR. GREENO:

Q. Let's say an individual is given a set -- a battery of neurological/psychological testing. Do you understand what that is?

A. Yes.

Q. And when neuropsych testing is done, those -- that testing is evaluated; is that correct?

A. That is correct.

Q. And let's say the person that evaluates that test finds a problem --

A. Yes.

* * *

[p.68]

color.

MS. FOULSTON: I think we've explained that, Your Honor, and I still have an objection as to relevancy, but I think that the doctor has explained

the foundation of the location of A-39 as among the data that he collected.

THE COURT: I'll admit it.

MR. GREENO: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

MR. GREENO:

Q. Okay. Doctor, as I understand it, with positron emission tomography technology, you are able to get a bunch of data and because of the technology you have, you are able to view it in -- from different aspects; is that correct?

A. Yes, yes.

Q. And what we see in this particular set of slides is going from -- is that back to front or front or back?

A. Front to back.

Q. Okay. Straight through?

A. Yes.

Q. And Exhibit No. 39, which has been admitted, it is a view that slices through, but it's on an angle; is that correct?

A. Let me make sure.

[p.69]

Q. That one right there.

A. This one?

Q. Yeah.

A. Yes, this is on an angle. And these are down like this, about at this orientation (indicates).

Q. Okay. And you are -- for the record, your hand has been going across the side of your head and it indicates it's higher in the back and lower in the front?

A. Correct.

Q. Does that give you a larger view of the temporal lobe?

A. Yes.

Q. And is that the area of the brain that you found was involved in this PET scan?

A. Yes.

Q. Okay. Okay. That's Exhibit No. 39. We've got you hooked up to a wireless now and you've got your pointer, can you get up there and --

A. Yeah. Right now.

Q. -- and show us what the relevance of this is?

A. Thank you. That will help my voice.

These are the tips of the temporal lobes. The nose is pointing up here, the back of the head is down here, left is there, right is there (indicating throughout.)

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As you saw from what I tried to present as being a roughly normal sort of picture, there is a definite decrease in activity in the medial parts of both

temporal lobes when you compare the medial with the lateral part. And it could, under ordinary circumstances, might be 10 to 20 percent less. This, however, is in the range of, perhaps, 50 percent. 50 percent less. This is the way that we look at things. We can actually go in there and look at the number itself. But as you saw with all the pictures to look at and so forth, that's ordinarily not what we do (indicating throughout).

Now, we do have an advantage in the clinical situation because you're sitting at the monitor and you have the computer under your control. And these pictures that you see here were taken as very standard and very adequate images. Sure, you could take all kind of weird whoppy-jawed orientations which wouldn't really show you what you wanted to display. And what I wanted to show here was a marked decrease in the medial temporal lobe which is the area where the amygdala lives and the hippocampus. Or exist (indicating throughout).

Q. Okay. Thank you, Doctor. Those areas that are involved in this decreased brain activity, do we know

[p.71]

what those areas are responsible for?

A. Yes. Yes.

Q. These are all part of the limbic system which is involved in motivation, involved in activity. The amygdala is right at the end of the limbic system. And its job is -- as is currently known or understood is to place meaning on -- and risk to events. Just as

when you hear a noise, there -- or hear a sound, there is a place in the brain that attaches meaning to that sound. The amygdala attaches a matter of risk to the -- to the events. And you also --

MS. FOULSTON: Your Honor. Excuse me, Doctor.

THE WITNESS: Yeah.

MS. FOULSTON: Objection as to the forensic evaluation and analysis.

THE COURT: I have found, I believe, that there is no foundation to qualify this witness to give an opinion as to what the abnormality might mean in the interpretation of or prediction of human behavior.

MR. GREENO:

Q. Doctor, we're not talking about prediction of human behavior; is that right?

A. That is correct.

Q. We're -- what I'm asking you about is do you know as a

* * *

[p.76] [*Cont. Cross-examination of David Preston, M.D. by Mr. Evans*]

A. Yes.

Q. Did you find that the scanner that generated the PET scan was a state-of-the-art device?

A. Yes.

Q. Technically speaking, did you find it to be a satisfactory study?

A. Yes.

Q. Did it generate a picture of Jonathan Carr's brain?

A. Yes.

Q. Let me hand you what I've marked as Defendant's Exhibit 2. It's actually JC-2, Dr. Preston. Is that the image of Jonathan's brain that that PET scan produced? I don't have that up there.

A. Oh, that's fine. Yes. This one.

Q. Okay.

A. Yes.

Q. And in looking at that PET scan, is this a diagnostic tool to diagnose brain abnormality?

A. Yes.

Q. Did you see brain abnormality in the PET scan that was generated of Jonathan Carr?

A. Yes.

Q. And is that reflected in JC No. 2?

A. Yes.

MR. EVANS: Move for admission of JC-2,

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Judge.

MS. FOULSTON: Same objection as to relevancy.

MR. GREENO: No objection, Your Honor.

THE COURT: I'll admit it.

MR. EVANS:

Q. Dr. Preston, I'm about as technically challenged as they come, but let me see if I can work this thing.

(Off-the-record discussion.)

Q. Now, I've flashed up there -- is that the same picture that's depicted in JC-2?

A. Yes.

Q. If you could show the jury the abnormalities that you found in Jonathan's brain.

A. Well, after looking at all the various cuts that we -- that we've shown previously on Reginald, we can come down to these again temporally-oriented views. And again, we see this deficit in metabolism in the region of the hippocampus and in the region of the amygdala. And again, this is a question about this should reflect a deficit in metabolism in regions associated with short-term memory and with assigning risk to events.

MS. FOULSTON: Your Honor, again, objection to the --

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A. Oh, okay.

THE COURT: Nonresponsive?

MS. FOULSTON: Nonresponsive and objection to the opinion given of a forensic nature.

THE COURT: I'll sustain as not responsive.

MR. EVANS:

Q. Dr. Preston, you found injury or damage, abnormality in the amygdala part of Jonathan's brain; is that right?

A. That is correct.

Q. And you also found injury, damage, abnormality in the hippocampus part of his brain; is that right?

A. That's correct.

Q. The hippocampus deals with short-term memory?

A. Yes.

Q. The amygdala also deals with things like that; is that true?

A. Memory, but assigning -- assigning risks to events, yeah.

MS. FOULSTON: Your Honor, I again object, nonresponsive.

THE COURT: I'll sustain.

MR. EVANS:

Q. The abnormality to this part of Jonathan's brain, you said that that's the amygdala and the hippocampus; is

[p.79]

that right?

A. Yes.

Q. That is the same thing that you found when you looked at Reginald's brain; is that right?

A. That is correct.

Q. Is there anything that could be made of that? I mean this is a hereditary thing or how would you explain that?

A. I would not think it's hereditary. I -- we did the study and that's what we found.

Q. Do you have a medical opinion on what would account for this brain abnormality? What would have caused it?

A. Typically, at least in the patients that I have seen, closed head injuries would be the first thing I would think about. In the textbooks, that's what it says also.

MS. FOULSTON: Excuse me, Your Honor. Object as not responsive as it would relate to Jonathan Carr.

THE COURT: I'll overrule the objection.

MR. EVANS:

Q. Closed head injury?

A. Yes.

Q. Explain to the jury what that means.

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A. This is what might occur in playing football. A helmet-to-helmet blow, sometimes even lighter things than that, as opposed to a penetrating head wound, where you might have an ice pick or an ax or something of that sort that might penetrate the skull and get into the brain.

Q. It would be consistent with a blow to the head that would render someone unconscious?

A. Uh huh, yes, probably.

Q. Now, these parts of the brain, these regions of the brain that you find -- that you found to be abnormal, what do they control again?

A. Short-term memory and assigning (indicating) --

MS. FOULSTON: Your Honor, I'm going to --

THE WITNESS: Yeah.

MS. FOULSTON: Excuse me, Doctor.

THE WITNESS: Yeah.

Objection.

THE COURT: Overruled.

MR. EVANS:

Q. Short-term memory, and what were you about to say?

A. And assigning risk to events and situations (indicating).

MR. EVANS: That's all I have, Judge.

THE COURT: Thank you.

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Cross-examination, Mrs. Foulston.

CROSS-EXAMINATION

MS. FOULSTON:

Q. I'm back again, Doctor. This is cross-examination. And we're going to be going over some of the issues of that which you've testified to.

A. Yeah.

Q. I think you can use the regular microphone there or if you feel comfortable, go ahead with the one that you have.

A. I feel more comfortable with this one. Thank you.

Q. All right. Thank you.

Doctor, you had testified in response to some questions by Mr. Evans, Jonathan Carr's attorney, that -- that the findings that you located were not hereditary; is that correct?

A. I cannot -- I have not heard that this has been reported as being a hereditary sort of thing.

Q. And you said that in looking at this type of a -- a slice of a PET scan as well that the decrease in function was not terribly uncommon, is that correct, those were your words?

A. Yes.

Q. And so you said that there are many people in this world that might have a decrease in function in their

[p.82]

temporal lobes; is that right?

A. That is correct.

Q. And you also, I believe, talked a little bit about the fact that when we are looking at a PET scan, we're looking for the metabilization of the glucose that's attached to an isotope so that we can see it --

A. Yes.

Q. -- is that right?

To see how the brain functions; is that correct?

A. Correct.

Q. And in doing so, and we'll go back to the normal one, the roughly normal scan that you talked about, in that particular instance, you were not aware of any metabolic problems that the suggested patient might have had, were you?

A. This patient had -- actually had a problem that might cause a decrease in the region of the hippocampus.

Q. But -- I'm sorry, Doctor, did you -- did you meet the person whose PET scan you used?

A No.

Q. Did you review all of his medical records?

A. I reviewed the report that had the medical record -- synopsis of the medical record attached to it.

Q. And I believe that you also generated a report in this

[p.83]

case that was given to counsel for each defendant, Jonathan and Reginald Carr; is that correct?

A. Yes.

Q. And as you've told us today, that this particular Exhibit A-40 was the somewhat normal? Roughly normal?

A. Yes.

Q. All right. And in your report, I believe, that you classified this as a normal young male?

A. Yes. This is an error.

Q. All right. And so this would be a 50-year-old or so; is that correct?

A. Yes.

Q. And one might expect changes in metabolism as we age; is that correct?

A. It decreases as we age.

Q. Right. So there are things that cause changes in our body and our bodily functions as we age?

A. Yes.

Q. And in these two particular individuals, Jonathan and Reginald Carr, you made the same findings; is that correct?

A. That is true.

Q. And if I were to show you two scans -- these two diagnostic slides that you used, they're pretty identical, aren't they?

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A. They are very similar.

Q. All right. And in fact, if I looked at them, there's just a little difference in the way the color comes through on this one than it does on this one; is that correct?

A. Yes.

Q. And in Exhibit JC-2, that's a larger picture than in A-39?

A. Yes.

Q. And in these particular photographs, the same coloration is shown; is that right?

A. Yes.

Q. And so when you completed that, did you think you had two different people or just one people -- one person?

A. Well, I knew I had two people because they were done on different days.

Q. But other than that, if you saw these scans without the date information on them?

A. They are very similar.

Q. All right. So they almost could be taken from one person, then?

A. It's possible, I suppose.

Q. And you're saying heredity doesn't have anything to do with it that you know of?

A. That's true.

* * *

[p.141] [*Cont. Recross-examination of Amanda Carr by Ms. Parker*]

MS. PARKER: I don't have anything further.

THE COURT: Mr. Greeno.

MR. GREENO: Nothing further.

I would move to publish the items that we moved into evidence.

THE COURT: Mr. Evans, have you any questions of Mrs. Carr?

MR. EVANS: I don't have any questions.

THE COURT: Mrs. Carr, thank you very much, ma'am. You -- just -- yeah, step right out there, take a left and you will be back in the waiting room.

THE COURT: Publish your pictures, Mr. Greeno. And we'll -- we'll have our noon recess as soon as we finish that.

(Off-the-record discussion.)

THE COURT: Members of the jury, the admonitions still apply. We'll have our lunch now. 1:20, start again. Thank you.

(The noon recess was taken from 12:01 p.m. to 1:33 p.m., after which the following proceedings were had in the presence of the defendants.)

THE COURT: Thank you very much. Ms. Marquez, bring us the jury, please.

(The jury returned to the courtroom,

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after which the following proceedings were had.)

THE COURT: Members of the jury, as you'll recall, we're in that part of the case where evidence is being presented for Mr. Reginald Carr. The lawyers have all agreed to take one or two witnesses out of turn. That will be for Mr. Jonathan Carr. That's the next witness.

Administer the oath, please, ma'am.

LEROY CULVER,

called as a witness herein on behalf of Defendant Jonathan Carr, having been first duly sworn, testified as follows:

THE COURT: And Mr. Ron Evans for Mr. Jonathan Carr.

DIRECT EXAMINATION

MR. EVANS:

Q. State your name for the record, please.

A. Leroy Culver.

Q. Mr. Culver, you're from Dodge City; is that right?

A. Yes, yes.

Q. How old are you?

A. 73.

Q. Have you lived in Dodge City a while?

A. Quite a while. 50 some years.

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Q. You're married to a lady that's right outside named Juanita; is that right?

A. Right. Right.

Q. How long have you been married to her?

A. 53 years.

Q. Now, you know Jonathan Carr; is that right?

A. That's right.

Q. He did some work for you?

A. Yes.

Q. About how long did Jonathan work for you?

A. Approximately three to six months. And I am not sure of the exact time.

Q. What kind of business are you in? What kind of work were you doing?

A. I did light construction at that time.

Q. And Jonathan would help you in this light construction?

A. Yes.

Q. Do you recall how you came to hire Jonathan?

A. I needed some help and called the employment agency and they sent him out to me. And from then on he stayed with -- kept working for me.

Q. Was he a good worker?

A. Very good. Very good. Always on time. Of course, I normally picked him up, so that made it easier.

* * *

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CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

I, Sandra J. Berger, a Certified Shorthand Reporter, and a regularly appointed, qualified, and acting Official Reporter of the 18th Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in **Case No. 00 CR 2978, *THE STATE OF KANSAS, Plaintiff, v. REGINALD D. CARR, Defendant,*** and

Case No. 00 CR 2979, *THE STATE OF KANSAS, Plaintiff, v. JONATHAN D. CARR, Defendant,* heard on the 6th day of November, 2002, before the Honorable Paul W. Clark, Judge of Division No. 9 of said Court.

I further certify that at the request of Debra J. Wilson and Rebecca E. Woodman, Capital Appellete Defenders, a transcript of my shorthand notes was typed by me or under my supervision via computer-aided transcription, and that the foregoing transcript Volume 42, consisting of 197 typewritten pages, is a true copy of all of the proceedings, all to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Wichita, Kansas, this 21st day of March, 2003.

/s/Sandra J. Berger
SANDRA J. BERGER
CERTIFIED SHORTHAND REPORTER

SANDRA J. BERGER, CSR
Official Court Reporter

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 7, 2002]

THE STATE OF KANSAS,

Plaintiff,

vs.

REGINALD D. CARR,

Defendant.

THE STATE OF KANSAS,

Plaintiff,

vs.

JONATHAN D. CARR,

Defendant.

JURY TRIAL
Volume 43-A

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of

Sedgwick County, Kansas, at Wichita, Sedgwick County, Kansas, on the **7th day of November, 2002.**

APPEARANCES

PLAINTIFF:
Ms. Nola Foulston
District Attorney
Ms. Kim Parker
Deputy District Attorney
Mr. Kevin O'Connor
Assistant District Attorney
Sedgwick County Courthouse Annex
535 North Main Street
Wichita, Kansas – 67203

DEFENDANT REGINALD D. CARR (Appearing in person):
Mr. Jay E. Greeno
Of Counsel, REALS & WEBER
Attorneys at Law
Suite 215
250 North Water
Wichita, Kansas – 67202
and
Mr. John V Wachtel
KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC
1600 Epic Center
301 North Main
Wichita, Kansas – 67202

DEFENDANT JONATHAN D. CARR (Appearing in person):
Mr. Ronald F Evans
Mr. Mark A. Manna

Attorneys At Law
Death Penalty Defense Unit
Suite 302
112 Southwest Sixth Street
Topeka, Kansas – 66603

SANDRA J. BERGER, CSR
Official Court Reporter

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SANDRA J. BERGER, CSR
Official Court Reporter

* * *

[p.32] [*Cont. Direct Examination of Thomas Reidy by M. Greeno*]

ones or have negative experiences, it affects us as adults. The families are the strongest socializing force in life. That's a well-established fact. Children are also predisposed through heredity, so you have nature and nurture. The nature being the biological disposition you come into the word with and certainly nurture is what happens to you once you're here through your family which is the socializing force.

Q. Doctor, in regard to that particular issue, what kind of things do you look for in a history when you're talking about hereditary issues?

A. In hereditary issues, we're looking for any developmental deviation that you can go back and look in generations, problem histories, criminality. For example, there's some evidence that there may be some genetic link there. You're looking at any hereditary neurological difficulties, that sort of thing.

Q. Okay.

A. You're -- you're also looking at temperament. That's also a hereditary factor. The list goes on. Those are some of them. We know that deviance begins at home. Children are born, even though they may have some predispositions to act in certain ways, they really come into the world with almost a *tabula rasa,*

* * *

(p.34)

are -- and there's another slide corning up that will list a whole range of them. But what I'm talking about are issues such as mal- - child maltreatment, whether it's physical or sexual abuse. I'm talking about paternal abandonment. I'm talking about inadequate guidance and supervision. I'm talking about family criminality. We're talking about family mental illness. All of those factors can be developmental traumas and influence a growing person. And what happens is as these developmental traumas accumulate in a child's life, they get filtered through a protected -- a protective factors element.

Q. What are protective factors?

A. Protective factors are -- oh, such things as healthy -- one parent may be healthy, the other parent not, so the child may focus on the healthy parent. The healthy parent may protect the child from the unhealthy parent, for example. There may be nurturing teachers, nurturing individuals in the environment that can protect the child from some of these developmental traumas. And it's those response relationship, in other words, the more protective factors there are to balance the traumas, the less damage you have on outcome. The less the protective factors, the more likely you're going to have damage

* * *

[p.53]

alcohol and drugs. There was an instance of beating a teacher that his mother broke up in the ninth grade. The boys were shooting BB guns at each other when they couldn't find animals to shoot at. Jon shot Reginald in the head with a BB gun and I believe it's still there. So there was certainly a fair amount of early violent behavior in his life.

Q. We're talking about antisocial behavior and attitudes another risk factor.

A. Yes. He had his -- there was an arrest for a college robbery, although I understand that there was also something that happened earlier with a battery and some sexual solicitation as a teenager. Went on probation, he failed urine tests, tested positive for drugs. At the age of 11 he was holding drugs for dealers.

Q. Do you know where this was at? The age of 11, holding drugs for dealers?

A. I believe it was in Cleveland, but I am not certain.

MR. O'CONNOR: Judge, I'm going to object at this point for lack of foundation.

THE COURT: I'll sustain --

MR. GREENO:

Q. This information --

THE COURT: -- as to foundation on the last

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question.

MR. GREENO:

Q. That information that you got regarding these risk factors, where did this information come from? Some of it come from Mr. Carr?

A. Some of it came from Mr. Carr, some of it -- and the rest of it came from the people that I interviewed. And some that your investigator interviewed.

Q. Okay. Family members and friends of the family that knew them?

A. Yes.

Q. Okay.

MR. O'CONNOR: Judge, I'm still going to object. I would appreciate names.

THE COURT: I'll sustain the objection.

MR. GREENO:

Q. Okay. Can you name -- do you have your notes there with you? -- some of the people that you talked to?

A. Yes.

Q. Okay.

A. Janice Harding, Temica Harding --

Q. Let's talk about the holding drugs for the dealers at age 11. Where did you get that information from?

A. I believe Hr. Carr told me that.

Q. Okay. What about the teen drug sales and the use by

[p.55]

the age of 13? Do you recall who told you that?

A. I believe he did as well.

Q. Okay. What about the early continuous promiscuity?

A. Well, you know, I talked with a whole bunch of people. It's kind of hard to keep straight who said what on various topics. In terms of early sexual exposure, the promiscuity was from Reginald, I'm sorry, Mr. Carr, but we also had information on early sexual exposure from his mother, from Temica, from his wife Mandy, from a paternal aunt. They also told me that.

Q. Okay. Let's talk about the irresponsibility -- or irresponsible parent for three children. Where do we get that information?

A. That came from Mr. Carr as well as the mothers -- the two mothers of his children.

Q. And you talked to his sister as well, didn't you?

A. Oh, his sister, yes.

Q. Okay.

A. I'm sorry.

Q. When we're talking about irresponsible parent for three children, you're talking about Mr. Carr; is that correct?

A. Yes.

Q. Okay. Disruptive nonviolent rule violations in the jail. Where did that information come from?

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A. The records that you sent me of his incarcerations.

Q. Okay. And the parent models for drug use and behavior. Did you get the information on that from someone?

A. Yes. Got it from Mr. Carr, I got it from his mother, I got it from Temica, and I got it from his paternal aunt.

Q. Let's talk about what you got from his mother. Now, she's already testified in this particular case, she's indicated to us that she drank and that she smoked marijuana. Is that basically the same information that you got from her?

A. Yes, but she also told me she used cocaine.

Q. Okay. And then the gang affiliation at age 13, where did you get that information?

A. From Mr. Carr. But he had told this to his wife as well.

Q. Okay. Do you want to go to the next slide?

A. This one here?

Q. No. Yeah, there we go. Drug sales, early sex, sensation seeking. Now, you already indicated that the two issues we talked about, holding drugs for drug dealers by age 11 and drug use by -- sales by

age 13, you got that from Mr. Carr, is that correct, that information?

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A. Yes.

Q. What about the selling drugs with cousin?

A. As I recall, it was certainly from Mr. Carr.

Q. Alcohol abuse, heavy by the age of 16, where did you get that information?

A. From Mr. Carr and I believe one of his aunts.

Q. Okay. Mixed drink and marijuana with alcohol, where did you get that information at?

A. That I believe came from Mr. Carr.

Q. Okay. The age 6, touching girls at home.

A. That came from Mr. Carr and some other of the family members.

Q. Can we talk a little bit more about that? What was that all about?

A. There were reports that -- and what he told me is that mother would have children in the house that she was baby-sitting for and that he would engage in some sex play with them.

Q. Okay. Starting at age 7, frequent sexual activity with female cousin, where did you get that information?

A. That came from Mr. Carr and it came from the cousin.

Q. Okay. Can you tell us a little bit more about that? If you know.

A. My recollection without looking at the notes is that

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there were frequent periods of sexual activity that went on over a period of years --

Q. Okay.

A. -- with that cousin.

Q. The sex with upstairs neighbor. Where did you get that information?

A. Again, from Mr. Carr and others who had heard about that.

Q. Okay. Promiscuous sex activity?

A. Mr. Carr, I think.

Q. Okay.

A. And certainly his wife as well told me about that.

Q. Okay. And arrest and delinquent gang peers.

A. Oh, the arrests we know about. And he talked about his gang affiliation. He would write letters to his wife and knock out the "C" for Crips in the letters which meant he was a Blood. And so there were other delinquent behaviors. He was stealing money, he took some money from the grandmother in one instance and there are episodes of shoplifting.

Q. Okay. What do all these factors have to do with your assessment here?

A. Well, these all essentially go back to the Justice Department Model of Risk for Future Acting Out Violent Behavior. And to the extent that these are present,

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it fits that category and certainly would raise the risk. It doesn't necessarily say a particular person is going to act in a way. It doesn't say that they're necessarily going to be violent. It doesn't necessarily say they're going to shoot anyone. It simply says that this raises the risk of negative behavior and criminal conduct.

Q. Are there implications for the early alcohol and drug abuse in life?

A. Well, we know early life alcohol and drug use disrupts the development of maturity, it impairs judgment, it increases interaction with delinquent peers that are doing the same kind of things, it increases the risk of deviant behavior, increases the risk of violence. When you look at other government statistics about the risk of deviant behavior and delinquent peers, you find high rates of -- of substance abuse before and during crimes. So it's a major risk factor.

Q. Now we're talking about corruptive family influences. We got -- you checkmarked father abandoned the family. Where do we get that information?

A. Just about everybody in the family.

Q. Okay. Is there any specific effect that that --

A. Well, father abandonment is a -- is a -- or actually any -- any parent abandonment is a major, major risk

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factor across every study and textbook you ever want to read, that it leaves a significant void in a child's life. And in this instance, Mr. Carr had really strong, positive feelings about his father. And various family members, including Mr. Carr, had mentioned this positive affection for his father, despite whatever foibles the man may have had. And when the man left, there was a great deal of rejection. And he continued to reject any overtures that Mr. Carr made to him and that -- so it was quite a blow to him to have this father abandonment.

Q. The next issue is the mother/father drug and alcohol abuse. I think we've already talked about you got some of that information from his mother?

A. Right. And other family members as well. There's some allegation that mother obtained drugs from Reginald.

Q. Now, let's talk about that for a second. Where did you get that information?

A. I believe I got that -- some of that from Reginald.

Q. Okay. And his mother wouldn't admit to that. Okay? Is that unusual?

A. No, not at all. As a matter of fact, when you take histories from family members involved in serious situations, or actually not even involved in these

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kind, you'll get different histories. You'll get omissions. You'll get distortions. And it's through discussions with other family members you start to piece together things that may have happened in the family. So it's not uncommon.

Q. Okay.

THE COURT: Mr. Greeno, is this a good place to stop your direct examination for a morning recess?

MR. GREENO: Sure.

THE COURT: That's what we will do, members of the jury. We'll have our morning recess at this time. Thank you for your attention. We'll come and get you in about 15 minutes.

(A recess was taken from 10:17 a.m. to 10:42 a.m., after which the following proceedings were had in the presence of the defendants.)

THE COURT: Thank you very much.

Ms. Marquez, bring the jury, please.

(The jury returned to the courtroom, after which the following proceedings were had in the presence of the defendants.)

THE COURT: Members of the jury, continuing on now.

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Mr. Greeno, did you want that -- did you want that light dimmed again?

MR. GREENO: Oh, yes, I do, Judge.

MR. GREENO:

Q. Dr. Reidy, we're talking about these corruptive -- well, corruptive factors in general. Is there any kind of a criteria used in the psychological field where you have to have a certain number of these in order to make an assessment or is it --

A. No, there's no critical number you ever cut off, if you will. It's simply the more factors you have that influence development, the greater the probabilities are that you'll have some negative outcome. I don't think the science has evolved to the degree where you can actually count numbers. It doesn't work like that.

Q. And some of the bases for these factors that we're talking about you've already mentioned come from some studies that were done by the United States Department of Justice, correct?

A. Yes.

Q. Did some of them come from the United States Surgeon General's Office?

A. Yes.

Q. And the FBI?

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A. Yes.

Q. Okay. And you referred to some of those during the course of your preparation for this testimony?

A. Yes.

Q. Okay. And I think we left off, we were talking about maternal uncle's drug dealers and that was some information -- where did you get that information from, do you recall?

A. I got that from -- some of it from Reginald, as I believe -- Mr. Carr, I believe.

Q. Okay. Did his mother indicate she had a brother that was -- had gotten in trouble for that?

A. Yes.

Q. Okay. This Reginald drink with an uncle at age 11, where did that information come from?

A. I got that from Mr. Carr and I believe that some other family members had mentioned that things like that had occurred.

Q. Okay. What kind of corruptive factor is that?

A. Well, it's certainly very poor role modeling. It's part of that multigenerational impact of family problems that it's not just one parent, it's a whole group of family members. It certainly leads to very antisocial attitudes and other corruptive behavior that goes along with the drinking and so on.

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Q. Okay. The -- you got the cousin gang member and drug dealer, where did you get that information from?

A. That was from Mr. Carr.

Q. Was that the same cousin that was killed in Cleveland, Ohio --

A. Yes.

Q. -- shot in the head?

A. Yes.

Q. Father molested daughter and cousin, where did that information come from?

A. That came from Temica and some other family members.

Q. Okay. Now, here -- I understand that this -- that certainly would be damagibg to the daughter and the cousin. How does that impact Reginald?

A. Well, to the extent when he learned about it, it's unclear. But to the extent that it was going on in the family, it was part of that whole early sexual exposure that he was having. And it talks about the -- the atmosphere in the family that was conducive to that kind of behavior.

Q. Okay. Allegations of molestation by the mother and her boyfriend. Now, we got this one -- this is allegations; is that correct?

A. Yes.

Q. Okay. Did you attempt to try to verify any of that?

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A. Yes, I did. And I got various opinions from different individuals as to what went on or didn't go on. So I don't know whether it's true or not.

Q. Is that unusual when you do an investigation like this?

A. No, not at all. When you have a history of really family turmoil, family problems, it's not uncommon for individuals to deny certain behaviors, where others will acknowledge certain things.

Q. The same thing with the allegations of sexual sister thing?

A. Yes.

Q. That was -- you weren't able to verify that at all?

A. No.

Q. Okay. Discovery of pornographic photos of mother with stepfather.

A. Yes, this occurred when he was about 13. And fairly graphic photos. And he kept them all these years hidden away and these were just recently discovered. So I don't know what the meaning of them was, but certainly finding that kind of material with your mother is something that would be pretty traumatic. And if you view it within the context of the rest of these factors that we've talked about as well as the others on other slides, you can see that that is also

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a corruptive influence and affects the atmosphere in the home.

Q. You've got four uncles. He had some with criminal records, some with histories of substance abuse.

A. Yes, and mental illness as well. I forgot to put that in there.

Q. Okay. I think you have it on the next one. Mentally ill uncle --

A. Oh, I'm sorry, I do. Yes, there's mentally ill uncle and grandmother. Again, it just talks to the genetic vulnerabilities in the family. It doesn't necessarily mean in and of itself mean he is going to be ill, but rather we have a whole family system that has been damaged in a variety of ways.

Q. The next one talks about disturbed parenting and family management, low parent involvement, poor family role models. The first one you've got here is generally poor parent role models and rejecting. What do you mean by that?

A. Well, in general what I came to understand from talking to the various family members, as well as Mr. Carr, that these parents were not emotionally and physically available in a consistent manner to the children and certainly not after the parental divorce, when -- and even before it, when there is some

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domestic violence going on in the home, there was drinking, drug abuse, there was the paternal rejection afterwards. There was the mother emotionally abandoning the children, not being around for them regularly, taking off for days, weeks, months at a time. The children were kind of left to their own devises. They were shipped to various relatives at different times. Mother had some boyfriends to the house allegedly. There were allegations of unfaithfulness on both sides. There were allegations of sexual abuse by the mother and her boyfriends of the children. Sexual abuse of the sister and a cousin by the father which we've mentioned.

Q. Doctor, some of these are repeated, are those because they are also included in the U.S. Department of Justice model that you're talking about?

A. Yes, this is -- this is one of the headings from the Justice Department model. And some overlap, of course, to a certain degree.

The parents fail to participate in activities, sporting events. There was certainly a great deal of emotional abuse. There was physical abuse, whippings with belts that left marks. Children were made to strip naked for the -- for the whippings. The mother stayed in her room more often than not,

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ignoring the kids, felt comfortable there.

Q. Is that kind of an isolation issue?

A. It's very much an isolation issue. It's hard to be a good parent when you're not present. Whether you're physically in another room or somewhere else in the county or the state, the point is you're not physically present for your children. And the more that you isolate yourself from your child, the less likely they're going to feel a strong sense of bonding, attachment, a feeling of love, being cared for. And I think we all know from -- not just the scientific literature, but just common sense that that kind of thing is important.

Q. Well, could you substitute that, you know, with a -- provide a television in each room and a stereo and a VCR so they can be entertained?

A. Well, that may be very nice --

MR. O'CONNOR: Judge, I'm going to object, lack of foundation for the answer, at least at this point.

THE COURT: I'll overrule.

MR. GREENO:

Q. You can go ahead.

A. That would go to that whole isolation thing. That you can give children things, but what they really need is

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you as a parent figure, as a role model, as someone to interact with, someone to provide nurturing, loving attention, and the kind of hugging that we give our kids. And when that's absent, they can

have all the goodies that they want but there's going to be something missing in their lives.

Q. When you mentioned the incident with the stepfather putting the gun to the mother's head -- we've heard discussion about that already.

A. Yes, that can be a very traumatic event. The kind of thing that children remember for years and years. It's an instance of violence. And it certainly is part of that whole corruptive family influence and disturbed parenting for parent role models. And then mother abrogated responsibility for care and feeding of the children. Very often the children were left to their own devises to fix food for themselves.

Q. And that was confirmed with Temica, his sister; is that correct?

A. Yes. And as I said, the mother would leave for days or weeks at a time. Depending on which relative you talked to, it was either because of domestic violence, drug abuse, just to get away. Where she went, what she did, I don't know.

Q. When we talked about disturbed parental behavior and

[p.70]

how that affects these developmental pathways, first of all, with the mother, there were issues specific to the mother -- to Mr. Carr's mother in this particular case?

A. Yes, if we take some of those issues -- some of these are a little bit of an overlap from what I -- on the previous side, but nevertheless they are important

because it is disturbed parental behavior on the mother's part. There was use of electric cords, belts on the kids. They were made to strip first, another one of the others was told to hold the legs down. The kids could choose which belt, "Daddy Heat" or "Hot Rod." They named the belts. The abusive discipline left marks and welts. Temica mentioned a scar on her leg from an electric cord.

The mother was increasingly unattached, unavailable, in her room constantly. She was also gone from the home regularly. There was drug and alcohol use going on excessively. There were allegations of sexual abuse which we've discussed. Mother displayed minimal to no affection. Both Mr. Carr and his sister talked about the -- the fact that -- I think there was only one instance where they were told that they were loved. There was very little of that from their perspective. There was a

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lack of supervision of the children. It's hard to supervise if you're using drugs, alcohol, you're gone for days or weeks at a time or you're locked up in your room.

Q. You've got a quote down there from --

A. Oh, this is from the paternal aunt. She described the home as a terrible place for kids to grow up. The kids didn't have a chance. I'm sorry for the spelling. Mother's not a mother. Father's not a father. That was a direct quote from her. And she had some very negative things to say about both parents and the atmosphere in the home that was not very developmentally sound. There was domestic

violence observed with the mother and stepfather. And also I believe with the father as well.

Q. I think on the next line you talked about how this -- this relationship with the mother is considered in the literature.

A. Well, yes. As I said, children, as we know, growing up, those are your formative years. Your life course and pathways are determined. And children are much more vulnerable than adults to changes in their environment. They need stability, they need sameness. Kids need to take naps at the same time, for example. They need to know that a parent's going to be home for

[p.72]

them. When you never know what's going to happen from one minute to the next, it's hard to behave in a way that's consistent, it's hard to internalize standards because the standards change or there are no standards. And the normal child development depends on a stable relationship with a caring adult.

And a secure attachment to a parent figure is fundamentally important to healthy psychological development. And as I said earlier in this presentation, this is probably the single most talked about tenant that you'll find in the scientific literature.

Traumatic disruptions in the parent/child relation can cause immediate emotional distress, bewilderment, as well as lasting psychological harm. Disruptions here can be anything from

abusive behavior, absences, abandonment, lack of affection, lack of caring. All of those things can be traumatic to children and cause lasting harm.

The adverse impacts of disruptions and emotional bonding of a child with a parent, damage to one's identity, lowered esteem, various and sundry psychological disorders, anxiety disorders, depression particularly. Academic deficits, impaired capacity to trust and care for others. Deficient identification

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with social ideals. One -- in this kind of environment, one tends to become more morally corrupt and then various kinds of problematic delinquent, violent behavior can occur.

Q. What do you mean by damage to identity?

A. Who you are as a person. What your values are. And it's your values that help you determine how you're going to behave in society.

Q. Okay. Did you examine factors in his life regarding the relationship or the behavior of his father?

A. Yes. What I was able to piece together here was that there was indeed sexual abuse of his daughter and another female cousin. Absent or rejecting of children, especially post-divorce. There was minimal contact with the children over years. Virtually none. Efforts -- there was one instance in which Mr. Carr was supposed to go to visit his father for a summer and at the last minute before they went he said he didn't want him to come. And

so that on top of the other rejection when he left just simply compounds the problems in abandonment.

There were -- there was abuse of substances, alcohol, over-the-counter medications such as Robitussin. There were rage attacks. He acted crazy at times according to one of the relatives.

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Q. That was Dr. Harding, was it?

A. That was Dr. Harding, as I recall, said that to me.

Displayed minimal to no affection. Failed to pay child support, which certainly does not help the financial situation and hence contributes to more disruptive behavior in the home. There was domestic violence. Reginald observed his father chasing his mother down the street with a brick. The family was watching a movie, father was drinking Robitussin, started hallucinating and frightened the children.

So all of these type of behaviors certainly contribute to not only disturbed parenting, but a corruptive family home environment which if you take in the context of the other parent being equally as disturbed in her parenting, we start to see that there aren't that many protective factors here that are operating, at least in the home environment.

Q. I think we -- is that the next one or did we skip one?

A. Did we skip one?

Q. Yeah, there we go. Risks associated with father absent. These are some stuff from the literature; is that correct?

A. These are some -- these are some comments and summaries from the literature. And it's just to give you a general idea of what happens when fathers are

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not present. There's low supervision of adolescents are frequently found in father absent homes, that's more the cause of delinquency than poverty. Sexual homicide, 47 percent of sexual homicide perpetrators experience father absence by age 12.

Q. Where did that information come from?

A. That came from a textbook that was published by two of the FBI agents involved in that kind of work. And it was the result of, I think, interviews with 31 sexual homicide offenders.

Q. I think you got in here 36 somewhere now.

A. Oh, is it 36? I'm sorry. So much data to keep in mind.

Q. Go ahead.

A. They're more likely to commit school crimes. The likelihood that a young male will engage in criminal activity doubles if he's raised without a father and triples if he lives in a neighborhood with a high concentration of single-parent families. 70 percent of juveniles in state reform institutions grew up in single or no parent situations. 72 percent of

adolescent murderers grow up without fathers. Fatherless children are dramatically at greater risk of drug and alcohol abuse, mental illness, suicide, poor educational performance, teen pregnancy and

* * *

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behavior disturbances in males. It's usually more the acting out variety, but you can get socially withdrawn behavior. So -- but these are more the sexual ramifications.

Q. We talked about failure and lack of school attachment.

A. As far as I understand, he attended eight different schools, elementary school, and then one high school, but dropped out at the ninth grade before he was going to get thrown out because he had been beating up students. He felt the teachers disliked him. Depending on who you believe, he had poor grades or he was a brilliant student. But nevertheless, he apparently repeated the third grade, as best he can recall. The school records were not available to us to review. They've been destroyed, except for the -- I guess the ninth grade record which we have. We do know he was suspended in the eighth grade for sexually harassing a teacher. Eighth and ninth grades he was stoned daily going to school and during school. Excess absences in the eighth grade. There were 32 of them in the ninth grade. There were 21 detentions and suspensions. There were frequent fights.

So all of that early aggression behavior that we talked about earlier was seen through the school years and there was certainly not a strong

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attachment to school by virtue of having so many different ones and adjustment difficulties.

Q. We talked about corruptive community factors. These are some things that Mr. Carr reported to you?

A. Yes, these were reported by Mr. Carr. Some of the family members observed frequent fights. He certainly engaged in fights at school, in the community. He was running drugs for dealers and then selling himself by about age 13. Delinquent gang -- he was hanging out with delinquents, gangs, from -- by the age of 13. He certainly had easy availability from -- to drugs and alcohol at a very early age.

Q. Dr. Reidy, let me ask you, when you interviewed Mr. Carr and you were trying to get this information, was this stuff that he volunteered to you?

A. No, this was not easily gotten. It was pulling teeth to get information from Mr. Carr and from many of his relatives. If you didn't ask the right question, you didn't get an answer. You didn't -- so it was not like I was getting a narrative of this information. It was a very tedious process and details were hard to come by at times.

Q. Okay. The next slide talks about stunted moral development.

A. As a result of the risk factors and the corruptive

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influences and the pathways toward delinquency, crime and violence that we've talked about, you can't help but understand that there's a stunted moral development that occurred with Mr. Carr as he went along. There's evidence of inadequate self-control, there's a reduced regard for self or others. Reduced community identification, perception of others as hostile. Distorted view of maleness and sexuality. Deficient moral reasoning, desensitization to violence. And aggression viewed more as normal and appropriate. When you are raised in an environment that's aggressive and you're engaging it in for years and years at a very early age it becomes a way of life. And so it certainly does not bode well for a positive life outcome.

Q. The next one, this is the model of risk for sexual homicide. This comes from the book that was written by the FBI investigators; is that correct?

A. Yes, two of them were FBI investigators. And they developed a model for risk for sexual homicides after interviewing these 36 individuals. And their model talked about sexual and physical trauma, direct and indirect, played a role in the homicides.

Q. What's that mean?

A. Either they were directly abused physically or

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sexually or they saw others abused in the family. There was a developmental failure and attachment disturbance. They didn't connect with a parent figure and family members. And there was an interpersonal failure of caretakers as role models. The parents just simply weren't parents. And if you think back to -- to what his paternal aunt, Demetris White, said, that these parents certainly fulfilled this criteria, that they just weren't there for them. And I think you can see from what I've presented that all of these areas certainly were disturbed formative events and fit into this model.

Q. Did they come up with a list of sexual homicide risk factors?

A. Yes, they looked at the risk factors in sexual homicide cases that they looked at and they saw family history of problems, family alcohol history, 69 percent of those experienced that. Family history of drug abuse, 33 percent. Psychiatric history, 53 percent. Current family criminal history, 50 percent. Family sexual problems, 46 percent.

They looked at the history of child maltreatment with abuse and neglect. They found physical abuse history was present in 42 percent of the cases. Psychological abuse was present in 74

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percent of the cases.

They looked at -- they also determined that the relationship with parents and siblings was critical.

They found instability of residence was present with 68 percent of the cases. Father leaving before age 12 in 47 percent. Mother was the dominant parent in 66 percent of the cases. Negative relationship with male caretakers, 72 percent of the cases. Negative relationship with the mother in 44 percent. Perceive they're being treated unfairly in 53 percent. No older sibling role model in 44 percent of the cases.

So these individuals -- these experienced homicide investigators came to very much the same conclusions that the Justice Department did in looking at risk factors and putting together the influence of these risk factors, both the family and community and peers and so on, and determined that sexual homicides, that certainly these risk factors were present to cert- -- to varying degrees.

I think it's important to point out, as was mentioned in one of the questions to me, not everybody has every characteristic and factor. That's just simply not going to occur. But what you have to look at is the overall pattern of individuals that have

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multiple risk factors well above the average and well above the base rates of what you would expect. And so that's what's important to keep in mind.

Q. So how do all these things affect Mr. Carr? What does it show us about his pathways?

A. Well, if we take that first slide that we looked at earlier when I was talking about developmental traumas and the protective factors that either go to

less damage or more damage, from what we've been able to piece together in Mr. Carr's life, the developmental traumas were severe, the risk -- or the protective factors were minimal to nonexistent. And the developmental traumas led into the area of more damaged outcome than might be the case had there been more protective factors available to him.

Q. Now, these developmental traumas and this damage that you're talking about, is it only psychological damage?

A. No.

Q. What kind of damage can happen as a result of these kind of -- this kind of trauma?

A. Well, you can certainly have physical damage. You can have strong emotional damage, psychological damage.

Q. Do these developmental traumas, depending on when they occurred and how they occurred, sometimes affect the development of the brain?

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A. They can, yes.

Q. Now, then, we've talked about this briefly, early on, and I want to ask you about it in more detail. Now, we're looking at this information for a reason, to kind of figure out what's going on with Mr. Carr; is that correct?

A. Yes.

Q. Does it in any way absolve him of his responsibility for his actions?

A. Absolutely not.

Q. Does he know what he's doing when he does things?

A. Yes.

Q. Does he know what he's doing is wrong?

A. Absolutely.

Q. Then how does it affect him?

A. It simply raises the risk -- the choices that we make in life are limited to a great degree by the past experiences that we've had. And people make choices in life, but those choices are influenced by a lot of these developmental factors. And when your choices are limited, you go along a negative pathway. And then situational factors come into play and the situational factors then interact with the damaged individual and then you have violence, crime, so on.

Q. Okay. Does this mean that he's going to continue to

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have these problems in the future or are there going to be factors that would affect his behavior that can intervene now? For instance, structure, would that --

A. Structure, sure, to the extent that it -- that it prevents any further violence and some guidance as to what you do every day, how you do it, where there's no room for judgment, yes.

MR. GREENO: Okay. Thank you very much, Doctor. I don't have any further questions.

THE COURT: Mr. Evans.

MR. EVANS: I have none, Judge.

THE COURT: Cross-examination.

MR. O'CONNOR: Yes. Thank you, Your Honor.

THE COURT: Mr. O'Connor.

THE WITNESS: May I turn this off or do you want to refer to --

MR. O'CONNOR: Sure. Sure.

CROSS-EXAMINATION

MR. O'CONNOR:

Q. Okay.

A. Yes.

Q. Sir, one of the things I heard you say in talking to Mr. Greeno in regards to one of these risk factors is that you didn't know if it was true or not. I think it had to do with some kind of sexual abuse or

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molestation of mother with daughter or brother or something like that. Do you remember saying that --

A. Yes.

Q. -- don't know if it's true?

A. Yes.

Q. And in fact, most of what you learned about Reggie Carr, you don't know if it's true or not because it's based upon self-reporting and statements of people; am I correct?

A. Well, other than my observing it myself, I'm not sure how else I would know that is was true. Or -- so I mean, yeah.

Q. Yeah. So you don't know if the information that's being provided to you is even true; is that correct?

A. Well, some of it came from several different individuals telling me the same kinds of things. So I would expect that certainly a portion of it is true.

Q. Now -- and this is from several different people related to Reggie Carr, within the last few weeks is when you spoke with them; is that correct?

A. Yes.

Q. And just like at the end of October, I believe you spoke with Mr. Carr and sometime in September; is that correct?

A. Yes.

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Q. And this information that's being provided to you, what -- it's important to you that it -- you would hope that it would be true, is that correct, in reaching the conclusions or opinions that you've expressed?

A. Well, I wouldn't hope it's true, but I would like it to be true in terms of the developmental risk factors that have occurred. It -- there's certainly enough of

them that I found in talking to the different family members. It wasn't just an isolated event here and there. There were numerous -- numerous developmental issues, traumas raised by one family member or another.

Q. Now, the father of Reginald Carr, I think it's fair to say in the testimony that has come out and the information that has been told to you has been characterized as a pretty bad person; would that be fair?

A. Yes.

Q. And this father, were you provided with the telephone number to talk to Reginald Carr's father?

A. I don't remember if I had the number. I was told that when the defense team went to talk to him, he wouldn't talk to them.

Q. Detective Craig, I don't know if he's in the courtroom

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here now -- no, he's not. But he spoke with him yesterday, last night.

A. Uh-huh.

Q. Would it surprise you that he denies ever sexually molesting his daughter?

A. No.

Q. And you wouldn't know it to be true or not, you're not saying that Mr. Reginald Carr, Senior, is not telling the truth?

A. I can only tell you what his daughter told me.

Q. Okay. And --

A. It's not uncommon, by the way, when molest occurs for a perpetrator to deny it.

Q. And it also could be true that it never happened at all?

A. I don't know that. All I can tell you is what information I was given by the victim.

Q. And it's very easy to cast stones at somebody that isn't here, wouldn't that be fair? Who doesn't have -- that hasn't come forward; is that correct?

A. Well, I'm not -- I'm just trying to present information that is available that explains the behavior.

Q. I'm not suggest- --

A. I'm not here to cast stones. I'm simply here to try

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to explain how Mr. Carr got to be where he is.

Q. And I'm not saying you're casting stones. I'm saying the other people telling you that these things happened, it may not be true at all?

A. Yeah, I have no way to know what's true from many of them where there's one report. Where we have multiple reports, that raises the probability that these events did occur.

Q. Now, Reginald Carr, Senior, are you aware of the fact that Mr. Carr, Senior, Reginald Carr's father, has no criminal record whatsoever?

A. I didn't know one way or another about his record.

Q. He has a full-time job.

A. I don't know that.

Q. And he takes care of the family that he's with now. His wife and his children. You don't know that?

A. I don't know.

Q. Okay. Because you -- you weren't provided with a telephone number to talk with him. I mean it is important to determine whether or not it's true. At least talk to the people that allegations are being made against, wouldn't it?

A. Well, the -- the allegations are -- if they are denied, that's not going to be helpful at all. We have one person saying one thing, we have somebody

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else saying something else. You know, I can only take the information that's available and indicate that this is what I've been told.

Q. Well, you know, evidence is introduced in this case, came in in the guilt phase and it's presented and if it's a piece of evidence there's a chain of custody for it. The defense lawyers can get up and say where did that come from, what does it mean, challenge the evidence. In this particular case, Mr. Carr, Senior's, denying much of the information that has been provided to you. So it may -- what I'm--

A. So did his mother.

Q. And it may be true, that it didn't happen; is that correct?

A. It could be. I don't know.

Q. There was one incident -- did you look through the Community Corrections records on Reginald Carr? You say you looked at his criminal record, did you look at the prison records?

A. I looked at prison records and jail records. I'm not sure what was included, if there was something else in there.

Q. Well, in the Community Corrections record, it indicates that the time you talked about where at the last minute Reginald Carr, Senior, didn't want his son

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to come out and live with him --

A. Right.

Q. -- indicated in the records there that it was because there was an earthquake in California and his home was damaged and he had nowhere to put Reginald Carr. I mean --

A. I didn't --

Q. -- that could be true too?

A. I didn't see that.

Q. And so that could be the truth too?

A. That could be. It was perceived as rejection.

Q. And that's information that you received from Reginald Carr, that he perceived it as rejection?

A. Yes. The -- the absence of contact over the years has also been perceived as rejection.

Q. Now, a lot of the work that you do, you see people who -- you know, I don't know how to use -- other than saying pretty messed up people, kids?

A. Yes.

Q. Sexually abused?

A. Yes.

Q. Physically abused?

A. Yes.

Q. Horrible sexual abuse, horrible physical abuse?

A. Yes.

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Q. Horrible childhoods. Don't have a father, don't have a mother?

A. Yes.

Q. Don't have a house?

A. Yes.

Q. Okay. Parents are strung out on drugs. You see those types of things; is that correct?

A. Yes.

Q. So it's fair to say that you have come across in your experience people who have experienced a far worst childhood than what you've heard that Reginald Carr experienced?

A. I don't know how to -- far worse, I've certainly seen equally ,as bad until you want to define worse. But --

Q. I mean, come on, Doctor, worse would be being beaten every day, being sexually abused by the father. I mean you've seen far worse than what has been told to you about Reginald Carr; is that correct?

A. You know, I just kind of answered that the way -- I mean, what's worse? Are we talking percentages? We talking -- if you look at risk factors, if you try to add them up, how many did Reginald Carr have? How many did some mythical person that I saw in the past -- not mythical, but some person I saw in the past have? I can't answer that question that way.

* * *

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that?

A. I don't recall the details but I'm sure you can enlighten me.

Q. And he -- well, I'll try. He threatened the people who were pursuing him, telling him again that he would shoot them, he had a gun.

A. Okay.

Q. And he eventually struck, hit the people who tried to put him under arrest.

A. (Nods head.)

Q. Right?

A. Okay.

Q. And that he did not take responsibility for the crime even back then. He was found guilty, I believe, of aggravated assault.

A. Yes.

Q. And then he was put on Community Corrections, correct?

A. As I recall, yes.

Q. Well, what Reggie Carr then told you would be entirely incorrect --

A. Yes.

Q. -- about that incident?

A. Yes.

Q. And you say it doesn't surprise you, right?

A. Yes.

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Q. So what he told you about everything else in his life could be entirely incorrect and false?

A. Well, what he may -- it's certainly possible that what he -- some of what he told me may be inaccurate, yes. Whether every statement he made

to me was false, you know, I doubt that. You know, certainly talking to the other family members to a certain extent verified many of his statements. Some I couldn't verify.

Q. And so I'll ask you again, everything that he could have told you could be absolutely and totally false and incorrect?

A. Like I --

Q. Could be? I mean I'm saying it could be.

A. Hypothetically it could be, sure.

Q. Now, when he was in Community Corrections, he had some structure then, didn't he?

A. I don't know how your Community Corrections operates out here, but there would be some supervision. What that was, I don't know.

Q. And you did not review, I believe you told us, those records of Community -- Santa Fe Community Corrections, does that ring a bell for you?

A. I'm sorry, I don't remember. There were two huge volumes of records I saw, I just don't remember.

Q. I have them right here too on the desk. And it

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indicates that he was under pretty strict supervision. And they were trying to get Reggie to go to school.

A. Uh-huh.

Q. And trying to get Reggie to maintain a job.

A. Uh-huh.

Q. Am I correct?

A. Yes.

Q. And that would be something that you would do on Community Corrections?

A. Yes.

Q. And in fact, Reginald Carr did -- there are reports that he did very well in school. He was a good student.

A. Well, there were reports of that, yes.

Q. And there -- and those could very well be true, too; is that correct?

A. They could be. But we haven't been able to look at the records.

Q. Well, there -- there's a -- he was made to go to take a GED.

A. Yes.

Q. And did you have those records about the GED?

A. I know he got one. I haven't seen any other records.

Q. In fact, he got one very quickly; isn't that correct?

A. Yes.

* * *

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CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

I, Sandra J. Berger, a Certified Shorthand Reporter, and a regularly appointed, qualified, and acting Official Reporter of the 18th Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in **Case No. 00 CR 2978, *THE STATE OF KANSAS, Plaintiff, v. REGINALD D. CARR, Defendant,*** and **Case No. 00 CR 2979, *THE STATE OF KANSAS, Plaintiff, v. JONATHAN D. CARR, Defendant,*** heard on the 7th day of November, 2002, before the Honorable Paul W. Clark, Judge of Division No. 9 of said Court.

I further certify that at the request of Debra J. Wilson and Rebecca E. Woodman, Capital Appellete Defenders, a transcript of my shorthand notes was typed by me or under my supervision via computer-aided transcription, and that the foregoing transcript Volume 43-A, consisting of 123 typewritten pages, is a true copy of all of the proceedings, all to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Wichita, Kansas, this 21st day of March, 2003.

/s/Sandra J. Berger
SANDRA J. BERGER
CERTIFIED SHORTHAND REPORTER

SANDRA J. BERGER, CSR
Official Court Reporter

Nos. 14-449, 14-450

In the Supreme Court of the United States

KANSAS,

Petitioner,

v.

JONATHAN D. CARR,

Respondent.

KANSAS,

Petitioner,

v.

REGINALD DEXTER CARR, JR.,

Respondent.

On Writs of Certiorari to the Supreme Court of Kansas

JOINT APPENDIX VOL. 2

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
Counsel of Record
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com
Counsel for Petitioner
Kansas

SARAH E. JOHNSON
Counsel of Record
KANSAS APPELLATE DEFENDER OFFICE
700 Jackson, Suite 903
Topeka, KS 66603
(785) 368-6587
sjohnson@sbids.org
Counsel for Respondent
Jonathan D. Carr

NEAL KUMAR KATYAL
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com
Counsel for Respondent
Reginald Dexter Carr, Jr.

Petitions for Writ of Certiorari filed October 16, 2014
Petitions for Writ of Certiorari granted March 30, 2015

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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 7, 2002]

THE STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
REGINALD D. CARR,	)
	)
Defendant.	)
	)
THE STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JONATHAN D. CARR,	)
	)
Defendant.	)
	)

JURY TRIAL
Volume 43-B

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of

Sedgwick County, Kansas, at Wichita, Sedgwick County, Kansas, on the **7th day of November, 2002.**

APPEARANCES

PLAINTIFF:
Ms. Nola Foulston
District Attorney
Ms. Kim Parker
Deputy District Attorney
Mr. Kevin O'Connor
Assistant District Attorney
Sedgwick County Courthouse Annex
535 North Main Street
Wichita, Kansas – 67203

DEFENDANT REGINALD D. CARR (Appearing naught):
Mr. Jay E. Greeno
Of Counsel, REALS & WEBER
Attorneys at Law
Suite 215
250 North Water
Wichita, Kansas – 67202
and
Mr. John V. Wachtel
KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC
1600 Epic Center
301 North Main
Wichita, Kansas – 67202

DEFENDANT JONATHAN D. CARR (Appearing in person):
Mr. Ronald F. Evans
Mr. Mark A. Manna

Attorneys At Law
Death Penalty Defense Unit
Suite 302
112 Southwest Sixth Street
Topeka, Kansas – 66603

SANDRA J. BERGER, CSR
Official Court Reporter

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factor, I'm not sure.

Q. What test -- what testing do you have available to you because --

A. I'm referring to the neuropsychology report, they did an IQ test with him.

Q. A lot of the information indicates that he had many friends; is that correct?

A. That's what I've heard.

Q. There's been evidence, and I'm looking at A-26 and A-21, A-20 and A-25, that he drew pictures. Do you see that?

A. Yes.

Q. He has some artistic ability --

A. Yes.

Q. -- apparently.

A-15 indicates he knows how to write. It's a letter that he wrote to his momma.

A. Yes.

Q. There have been pictures introduced of him and what I've described as what -- or what has been described by the people who knew him at the time as a happy childhood. A-9, there he is with his dad, I imagine. A-12, right?

A. I see the pictures.

Q. And how it was described, Doctor, I know you weren't

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here, but it was described that it was a very happy young childhood. Do you have any disagreement with that?

A. Yes, I do.

Q. And that's because you've decided subjectively that based upon what you've heard that it wasn't a very happy childhood; would that be a fair statement?

A. No, it's not a fair statement. I don't think it's subjective at all. It's based upon the information that we gathered from various family members.

Q. Some of the various family members, you would agree that you're getting conflicting information from these various family members; isn't that fair? I think you've already testified --

A. Yeah, in some instances it was -- I don't know if conflicting with, they're omissions. One person would report one thing, someone else would report something else. There were denials. So there were some conflicts.

Q. Doctor, would it be fair to say that in your experience that you would expect people to lie sometimes or not tell the truth to avoid consequences?

A. Yes.

Q. That could have happened in this case?

A. It could have.

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Q. Now, one of the things that I forgot to mention about that Dodge City Sonic robbery, there was a cousin that he --

MR. GREENO: Your Honor, I'm going to object. I don't -- he's talked to this doctor about this Dodge City incident. I don't think he mentioned a robbery. I think he said there was an assault. A physical confrontation. But I don't think you ever talked about a robbery.

THE COURT: You're trying to say facts not in evidence?

MR. GREENO: That's correct, Your Honor. I'm sorry.

THE COURT: I'll sustain the objection.

MR. GREENO:

Q. He pled to an aggravated assault.

A. Okay.

Q. And that comports with the records you have; is that correct?

A. Yeah.

Q. And the evidence is, though, from the police reports, is that he took money from a lady --

A. Okay.

Q. -- in a book store, I believe, in a college.

A. Okay. Yes.

* * *

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correct?

A. I don't know if it happened.

Q. Well, but you do know she denies it?

A. She denied it when I asked her.

Q. And that the incident of Temica being molested by the father, Reginald Carr, in your report on Page 6, not really report, but you typed up of what Reginald Carr had to tell you, he -- he didn't see it; is that correct?

A. That's what he indicated. And then I think he saw them lying down together. Temica, on the other hand, as I recall, thought that he saw it. So there was -- certainly from Temica's standpoint she was being sexually abused and it was occurring at a time when the boys were around. Mr. Carr was around.

Q. Or it could be a completely false statement being made against this father again, right?

A. Well --

Q. All I'm asking you is it could be, Doctor?

A. It could be, I don't -- you know.

Q. And again, I think your answer was you do not know?

A. Right. I think everything that is said could be the opposite of what's said. But I'm just going upon several people telling me the same kinds of information and trying to reach conclusions based on a

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consensus of information, not necessarily just one report.

Q. So, Doctor, if I told you the sky was green and Ms. Parker told you the sky was green and Mr. Greeno told you the sky was green and Mr. Evans told you the sky was gieen and Mr. Manna told you the sky was green, would that mean the sky is green?

A. Well, that's somewhat of an absurd analogy.

Q. Now I'm simple and absurd.

Let's talk about the father. You put a thing up there, corrupted family influences on the father. One of the things you said was that he sexually abused the daughter and cousin. We've already covered the fact that that has been information that may be absolutely false; is that correct? It could be true, it could not be true?

A. Well, the daughter says it's true.

Q. And you didn't talk with the father?

A. No.

Q. The father in the conversation indicates that he did pay child support and continues to pay child support and, in fact, Temica called him just last week wanting money.

A. That may be, I haven't -- I don't know the -- I don't know that.

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MR. GREENO: I'm going to object. Those are facts not in evidence. I thought Ms. Harding testified she attempted to contact her father and he wouldn't accept the call.

THE COURT: I'll overrule the objection.

MR. O'CONNOR:

Q. Now, I believe you said earlier that the human being has the ability to make choices; is that correct?

A. Yes.

Q. Regardless of any so-called risk factors that they may have in their lives?

A. No, that's not entirely true. I think what I said was that the choices that we make are shaped by the experiences that we've had as we grow up.

Q. And it could be that a choice you make has nothing to do with the experience you have. You can't tell me within a reasonable degree of medical certainty that I'm always going to be -- whatever risk factors I may have in my life, Doctor, that I'm always going to make a choice on some risk factor or maybe my dad hit me when I was five; is that correct?

A. Right. You're not going to have -- right. You're going make choices all the way along. All I'm saying is that those choices are shaped by your experiences

and you're capable of making choices as you go along.

* * *

[p.78]

Q. Including --

A. I know that.

Q. -- dental injuries; is that right?

A. Yes.

Q. Okay. So those type of things you are trained to look at and look for and as a consequence, they come to your attention because there's a -- a reason for that, to protect children?

A. Uh-huh.

Q. Is that yes?

A. Yes, it is.

Q. And one of the areas is -- well, and in your practice, Doctor, as a pediatrician, have you ever had the occasion to deal with a child that has been sexually assaulted.

A. Yes, I have.

Q. So that you were aware as well of the reporting requirements of --

A. Yes, I'm aware of the reporting requirements for sexual assault.

Q. And you take that seriously?

A. Yes, I do.

Q. Now, when your sister, Janice Harding, was living in Dodge City and when you were seeing each other, in fact, she worked for you and took care of your kids;

[p.79]

is that right?

A. Yes, she baby-sitted for me.

Q. Okay. And you trusted her with your children?

A. Yes, I did.

Q. And did they thrive under her care?

A. Yes, they -- they love my sister.

Q. And is there anything about the family relationship that you saw with your sister and your niece Temica and your nephews that would cause you any anxiety that they were being abused?

A. No, they never told me they were being abused.

Q. Did they ever tell you that they were neglected?

A. No, and they never looked neglected. They always looked real healthy, nourished. Always had fairly decent clothes, you know. And they may not had everything they wanted, you know, toy-wise and things, but they had things. So, no, I never saw where it looked like they were neglected.

Q. So --

A. They never came to me and said, Auntie, help me, you know, I'm neglected. I've been hurt, you know. They've never said anything to me, no.

Q. I'm going to ask you to speak up a little bit because sometimes at the end of your sentence your voice goes down.

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Dr. Harding, you also had the opportunity to go to their home as well, did you not?

A. Yes, I've been to their home.

Q. And you knew that they had bedrooms with televisions and they had stereos and things that young people would want for entertainment; is that right?

A. Yes, when they got older.

Q. Right. Not things that you might have had as you were growing up?

A. No.

Q. But they were provided for in those ways as well?

A. Yep. I still don't have a stereo in my bedroom.

Q. Neither do I.

Dr. Harding, you also spent a year or more -- a couple of years with your niece Temica out in California; is that correct?

A. Yes.

Q. And you placed her into a -- a private school at that location?

A. Yes, her and my daughter.

Q. And your daughter Barbara?

A. Yes.

Q. And they were close in age; is that right?

A. Well, my daughter, about six years difference.

Q. So Temica was a little bit older?

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A. Yes, because my daughter was -- when we moved to California, my daughter had just started kindergarten and Temica was in fifth grade.

Q. Okay. So by the time that Temica -- in fifth grade, she would have been about- --

A. Ten.

Q. -- ten. When she moved out there, her parents were already divorced at that time; is that right?

A. Yes.

Q. And the father was out of the home at that time; is that right?

A. Yes.

Q. And you had her living with you and you were the parent at that time?

A. Yes. My mother was living there at -- also. My mother was living with us also.

Q. All right. So your mother, grandma's there, the two children, and you're doing your residency and you're still working to keep this family together; is that right?

A. Yes.

Q. And did you enjoy a close relationship with Temica?

A. Yes, I did. She -- we had a good time together while she was there.

Q. And as a pediatrician, did you ever note signs of

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abuse or neglect on your niece Temica?

A. No, I did not. Never.

Q. Now, as a young child, I'm sure that you have developed a manner as a pediatrician, you kind of seem like a pediatrician the way you talk and soft-spoken, did you -- you have that same kind of a relationship with your niece Temica?

A. Yes. I like to read to my kids. And we like to go and -- well, I like to shop. So we shopped a lot. We did a lot of things together. Went to church in California too. We talked a lot. And I know one thing that I noticed there is I would think that she would tell me if anything was going on because it seemed to me like she missed her mom. Because after she was there for a while, I knew she was kind of pining to go back because she would talk about -- that's all she would talk about, was I want to go home. And she was -- when it was time that she was ready to go back, then I went ahead and we sent her back.

Q. Do you feel that Temica trusted and loved you?

A. Yes, I think so.

Q. Did she feel safe in your home?

A. Yes.

Q. But she never told you, did she, that her father had

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sexually molested her?

A. She never once told me that her father sexually molested her, no.

Q. Did she ever tell you that her brothers sexually molested her?

A. No, she did not.

Q. And did you know her at the time at that age when it was close in time to when it should have occurred to be a truthful child?

A. She seemed to be truthful.

Q. Did you see any evidence of anxiety or depression in her that you would see in a child who, perhaps, had been sexually exploited?

A. No, she seemed to be a very happy child. While we were in California, we did quite a few things together. And since it was my internship and residency, my first two years of internship and residency, I got a chance to do a lot of things. Like I was doc at asthma camp. So they got a lot of opportunities that they wouldn't have got. She

didn't have asthma, but she got a chance to go because I had to go.

Q. Okay.

A. And so she got a chance to go. So they got a chance to do lots of things. And we got a chance to talk in

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lots of group activities. You know, the program that I trained in was a -- they had experts in -- who taught you sexual -- how to do a sexual abuse exam. And these same doctors that did these sexual abuse exams are the doctors that I took my daughter and Temica too. So I figured if something had happened and she didn't confide in me because she was scared to, they would have noticed. Because a lot of times you bring a child in for an exam, then they will say, well, something's happened to this child, because we were taught to do complete exams and that includes the genitalia. And no one ever said that she had had any -- any injuries that would look like she had been abused. That she never said that and they asked those questions, I know.

Q. And there are ways to just briefly look and determine the --

A. Yes, and then they asked there too.

Q. Sure.

A. And usually, you know, they'll ask -- and a child her age, when you take them to see the doctor, that's right at the age when they'll ask you to leave so that they can talk to the child alone and ask them questions because, unfortunately, nowadays, 10, 11

and 12-year-olds are smoking and drinking and doing things

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that they shouldn't do. So they'll send you out the room so that they can ask personal questions. And then that way the child won't feel fearful.

Q. Doctor, your training would also include, as you said, not only doing the sexual assault exam, but as a pediatrician being able to recognize the changes in habits or depression in a child that might lead you to suspect abuse of a sexual nature; is that right?

A. Yes.

Q. So you would see a child that may be bed wetting; is that right?

A. Yes.

Q. Night terrors?

A. Yes.

Q. Withdrawn?

A. (Nods head.)

Q. Correct?

A. (Nods head.) Yes.

Q. Failure to thrive in the -- their environment, poor work in school. There's a number of different factors that you as a physician would look for in evaluating?

A. Some of those are not specific.

Q. That's right.

A. I can truthfully say that as my niece is concerned, she was an excellent student. Okay? She was a bed

[p.86]

wetter, but she had been a bed wetter since she was little. And then she grew out of it.

Q. Okay.

A. So it was sort of like she was there and then it went away. And those kind of things kind of just improved.

Q. So you're not --

A. So none of those things fits her. She doesn't fit a profile of a child who has, you know, been sexually abused or fearful. She even -- with some children, if they've been physically abused too -- excuse me, I have a cold I've been trying to hold off.

Q. Would you like some water?

A. Could I, please?

(Off-the-record discussion.)

THE COURT: There is some -- are we at a good place to take our afternoon recess? It's time for that.

Let's do that. We'll take a little 15-minute recess, members of the jury.

(A recess was taken from 3:02 p.m. to 3:29 p.m., after which the following proceedings were had in the presence of Defendant Jonathan D. Carr.)

THE COURT: Thank you very much.

Ms. Marquez, bring the jury, please.

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(Off-the-record discussion.)

THE COURT: Members of the jury, continuing on with Dr. Harding. We're in cross-examination still.

Mrs. Foulston.

MS. FOULSTON:

Q. Dr. Harding, we had left off having some discussion about your niece Temica having lived with you and not having any evidence or information that ever came to your attention that she had experienced a sexual episode when living with her father; is that correct?

A. Yes.

Q. Now, at some point in time, it seems that you had the children with you at different points during their formative years and even later; is that correct?

A. Yes.

Q. And, in fact, at some point when Jonathan was living in Dodge City and had some problems with the law, you again came to the aid of the family and worked with the Court to have him live with you; is that right?

A. Yes.

Q. And how long a time did he live with you?

A. He didn't stay there that long. I remember that he was having, you know, trouble with the law. You know, he had gone on the joyride with his friend. And they

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too much, yes.

Q. And that was -- is there a difference in perspective that one might see from a child of, say, 10 or 11 versus an adult perspective?

A. Yes, because some adults drink a lot and then they don't think they do. And -- but, you know, they do when they start to get in problems with liver disease and such. So, yes, they drink too much.

Q. I guess my question was not a good one. My question was seeing -- hearing things from children or seeing things through the eyes of a child with their limited amount of years on this earth, is it a different perspective than that which an adult would have, so if the kids are saying, you know, I see this going on and adults look back on it, would there be a difference in perspective?

A. Yes. There would be a difference in perspective. But I don't think that children -- not -- don't know that their parents drink too much. Because I can definitely say we had a relative that came to live with us because she was sick. And she was alcoholic. And we knew she drank too much because she was not supposed to drink. And my parent, which was my mother, tried to keep the drink from

her. But some kind of way she would get it anyway. And she would

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find bottles hid here and there. And she would drink until you couldn't wake her up. So we know what being drunk means. And I think that a child knows what being drunk means.

Q. And is it -- was there any reason that you were given by any of these children that led you to have cause to concern yourself with Janice's behavior?

A. For drinking, no, just that they just felt that she drank too much. And I know that they felt that their dad had drank too much. And he had -- you know, I mean drank to the point where he was drinking not just regular alcohol but cough syrup and other things, too.

Q. Okay.

A. So --

Q. Now, under the disturbed behavior, again they say that -- apparently that your sister did not protect against allegations of sexual abuse with the children. What do you have to say about that?

A. That she didn't protect?

Q. Yes.

A. Well, if she didn't protect them and she knew about allegations, then I think that that was wrong.

Q. But if she didn't know --

A. Then there's nothing she could do about it. There are kids that hide that kind of stuff for years and then

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all of a sudden they come out and say I was abused.

Q. Now, your niece Temica didn't come out with it until in this Court and after talking to Dr. Reidy in 2002. That's when we heard the first report from Temica about this sexual assault. And based on your knowledge, was that surprising?

A. Well, yeah, I just heard about it today. Because I -- I haven't been listening to the trial. You know, when I came up here -- the day that she testified, I was up here, but I couldn't listen to the trial because I was trying to keep my little boy from coming in here.

Q. Okay.

A. Okay? So I didn't hear her. So it wasn't until somebody mentioned to me that they had heard these things that I said, oh, you know. And it -- it shocked me. It surprised me, I didn't know.

Q. And your -- your two children are out there with your sister; is that right?

A. Yes.

Q. And she's a -- she cook for them, too?

A. Sometimes. When they're -- yeah, when they come -- when they go over to her house after --

Q. Okay. So they sometimes go to her home?

A. Yes, if I'm busy, have a C section or something and I'll call her up and say can you pick them up because

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I'm running late, and then she goes and she feeds them.

Q. And apparently Christopher, your son, likes the way she cooks Thanksgiving?

A. No, she likes the way I cook Thanksgiving.

Q. Oh, all right. Okay. All right.

The disturbed parental behavior that they suggested of your sister was that she displayed minimal to no affection to her children. Do you have a comment on that?

A. Well, that surprises me too.

Q. Why's that?

A. You know, I don't know, I just -- I'm just shocked over a lot of these things that I'm hearing now, you know, but I can -- I wasn't -- maybe it's because I was -- I graduated from high school, I went straight to college. I came home to visit and, you know, I always enjoyed going to see my sisters and brothers. I still do because I'm a family-oriented person. I like family. I love children. I loved her kids. It made me very happy when she had kids. I would have wanted all of them. I was jealous of her. I had to choose between career and kids. I didn't have any kids of my own. All my kids were adopted, okay? So, you know -- and you know, she has kids and then I have

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A. Yes.

Q. And your nephew Jonathan and your nephew Reginald, do either of them qualify as being emotionally disturbed?

A. I don't know. I've never really made the diagnosis on them. I don't know.

Q. Just from your day-to-day contact, do they appear to be emotionally disturbed?

A. Gosh. That is a hard call. Well, sometimes I used to feel that they were emotionally labile, especially, you know, just like angry sometimes. Reginald especially. Jonathan, you know, sometimes. But emotionally disturbed, per se, I couldn't really say. I'm not a psychologist, per se. And, you know, and even with my own children, I didn't make the diagnosis. I knew -- I knew it was something wrong and I took them to be seen by somebody when I started to realize it was something wrong.

Q. But when you were around these children at that same age, was there anything that led you to believe that these children were abused or neglected or emotionally disturbed?

A. No, I -- I felt that they might have been some problem with learning disability at one time with Jonathan. And I thought that that made him have some -- some -- maybe some self-esteem problems and such. And, you

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know, and counseling-wise with Reginald, I know he had what appeared to be some problems, you know, which I thought were maybe emotional problems because of the loss of his father. Well, you know, not, you know, physical loss, but emotional loss of his father as such, and that might be considered as emotional disturbance in a child.

Q. There's an allegation that -- of disturbing parental behavior by your sister Janice, suggesting that she would be gone for weeks, sometimes with a boyfriend, and left the children alone to care for themselves. Do you know of any incidents of that nature?

A. I -- you know, she was -- I was told that there were times because I had relatives who said that she would bring the kids over to their home and leave them, with they dad too. And they would be there for a long time and then they would come back and get the kids. But I never heard of the kids being left in the home alone. And, you know, what age did this happen at? Because it seems to me if they were by themselves they would have called somebody if their parents didn't come home. Because they had grandmas on both sides of the family, aunts, uncles that were all adults that they could've called.

Q. This was represented as gone for weeks, sometimes with

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boyfriend and children left to care for themselves.

A. No, I didn't know about that. So you have to ask whoever gave you that report.

Q. That would be Dr. Reidy.

A. Oh, well. You have to ask him where he got the information because they didn't get it from me because I didn't know about that.

Q. Is there a paternal aunt by the name of Demetris White?

A. Yes, that's his -- their father's sister.

Q. Reginald Carr, Senior's, sister; is that correct?

A. Yes.

Q. Now, after the divorce, did the families have consistently good relationships between Hardings and the Carrs?

A. Well, I didn't really know them that well. I wasn't around them. I know -- I have talked to -- and they call her Metris for short, on occasion. So -- and she seems to be okay, you know. But I don't know what -- I don't know if there's that good of a relationship between Janice and Metris. But I think that maybe Temica and her aunt, there's a fairly -- there's a pretty good relation between them. And --

Q. Let me --

A. -- I don't know about the boys, whether or not they

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CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

I, Sandra J. Berger, a Certified Shorthand Reporter, and a regularly appointed, qualified, and acting Official Reporter of the 18th Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in **Case No. 00 CR 2978, *THE STATE OF KANSAS, Plaintiff, v. REGINALD D. CARR, Defendant,*** and **Case No. 00 CR 2979, *THE STATE OF KANSAS, Plaintiff, v. JONATHAN D. CARR, Defendant,*** heard on the 7th day of November, 2002, before the Honorable Paul W. Clark, Judge of Division No. 9 of said Court.

I further certify that at the request of Debra J. Wilson and Rebecca E. Woodman, Capital Appellete Defenders, a transcript of my shorthand notes was typed by me or under my supervision via computer-aided transcription, and that the foregoing transcript Volume 43-B, consisting of 148 typewritten pages, is a true copy of all of the proceedings, all to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Wichita, Kansas, this 21st day of March, 2003.

/s/Sandra J. Berger
SANDRA J. BERGER
CERTIFIED SHORTHAND REPORTER

SANDRA J. BERGER, CSR
Official Court Reporter

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 8, 2002]

THE STATE OF KANSAS,

Plaintiff,

vs.

REGINALD D. CARR,

Defendant.

THE STATE OF KANSAS,

Plaintiff,

vs.

JONATHAN D. CARR,

Defendant.

JURY TRIAL
Volume 44

PROCEEDINGS had before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of

Sedgwick County, Kansas, at Wichita, Sedgwick County, Kansas, on the **8th day of November, 2002.**

APPEARANCES

PLAINTIFF:
Ms. Nola Foulston
District Attorney
Ms. Kim Parker
Deputy District Attorney
Mr. Kevin O'Connor
Assistant District Attorney
Sedgwick County Courthouse Annex
535 North Main Street
Wichita, Kansas – 67203

DEFENDANT REGINALD D. CARR (Appearing in person):
Mr. Jay E. Greeno
Of Counsel, REALS & WEBER
Attorneys at Law
Suite 215
250 North Water
Wichita, Kansas – 67202
and
Mr. John V. Wachtel
KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC
1600 Epic Center
301 North Main
Wichita, Kansas – 67202

DEFENDANT JONATHAN D. CARR (Appearing in person):
Mr. Ronald F. Evans
Mr. Mark A. Manna

Attorneys At Law
Death Penalty Defense Unit
Suite 302
112 Southwest Sixth Street
Topeka, Kansas – 66603

SANDRA J. BERGER, CSR
Official Court Reporter

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SANDRA J. BERGER, CSR
Official Court Reporter

* * *

[p.13] [*Cont. Direct Examination of Mitchel A. Woltersdorf by Mr. Greeno*]

diagnose it.

Q. And you get a lot of referrals from doctors to do the testing to determine what is wrong with somebody's brain; is that correct?

A. Yes, we see about 15 to 1800 patients a year.

Q. Okay. And how many -- you referred to traumatic brain injury as TBIs?

A. Yes, TBI.

Q. How many traumatic brain injuries have you examined so far in your career, do you know?

A. It's a little bit over 10,000 right now since 1990. We do about 800 a year here.

Q. Okay. Pursuant to our request specifically, what test did you administer in this case?

A. You want me to repeat the ones I mentioned earlier?

Q. Yeah.

A. The battery consists of the Wechsler Adult Intelligence Scale, Third Edition, which is an IQ test; the Wide Range Achievement Test, Third Edition, which is an achievement test, reading, writing, math; the Memory Assessment Scales, which is a test of memory; the Halstead-Reitan Battery, which is a group of tests numbering

anywhere from seven to nine depending on how they're administered; and then two psychological batteries, the MMPI-2, which is called

[p.14]

the Minnesota Multiphasic Personality Inventory, Second Edition; and the Milan Clinical Multiaxial Inventory, Third Edition, which is called the MCMI, 3. That's the entire battery that we used.

Q. In addition to those tests, was an interview conducted with Mr. Carr?

A. Yes.

Q. What was the purpose of that interview?

A. Basically if I were -- if I was going to go on the assumption that we were looking at somebody with a brain disorder that could lead to violent behavior, we were looking at, again, TBI or seizure disorder. So the interview was basically to get a feel for has Reginald ever been knocked out, was he familiar if he ever had a seizure, woke up on the floor, didn't know how he got there, things of that nature, to get a feel for the historicity, or the stuff that came before my seeing him.

Q. Did you get information from Mr. Carr that was significant?

A. Yes, without specifically having dates depending on. He mentioned he had been knocked out in fights a number of times. He denied to me any physical abuse of -- when he was a child. So he did not report any knockouts in grade school. He did not appear to have

[p.15]

any phenomena that looked like seizure disorders. He did report that he had a pellet or a BB in the right posterior portion of his skull. And he indicated that he had been in the hospital a long time after birth but did not know why.

Q. Okay. In addition to the tests that you performed, did you request additional testing?

A. When I -- yes, when I spoke with your office, I asked that we get a PET scan, an MRI and an EEG.

Q. Thank you. And were the results of those tests provided to you?

A. Yes.

Q. Okay. We've already heard about the PET scan. What do we learn from the MRI and the EEG?

A. The MRI was normal and the EEG was normal.

Q. Okay. And we'll get back to that later on. Was there any history of any previous neuropsychological testing with Mr. Carr?

A. Not that he was aware of.

Q. When you administer neuropsychological testing, are there any procedures or norms that are established by the test manuals?

A. Yes, each test manufacturer produces a manual that requires the technician -- and just for clarity's sake, I do the interview and a technician, much like a

* * *

[p.40]

order in which the tests were done, so now we're almost at the end of the day, we know that he didn't try to malinger on any of the cognitive, the thinking parts of the tests, so now you want to make sure that he doesn't malinger on the emotional parts of the test. So had he malingered on both the MMPI-2 -- and remember, malingering is faking, try to look worse than you are. If he would have malingered on the entire MMMP-2 and MCMI-III, then that would have been a confound for me. I didn't have that so I was comfortable with it.

Q. Okay. What did these tests -- what results do these tests produce? What did you learn?

A. The MMPI-2 produced a -- what's called a 2, 4, or a 2, 4, 6 profile, which basically means that of the scales that are on the MMPI, scale 2, which is depression, scale 4, which is antisocial problems, scale 6, which is distrust or paranoia, were elevated excessively.

Q. What does that mean?

A. Well, I was getting to that.

Q. Okay.

A. What you have to then do is you have to make sure that those scales -- because 2 and 4 can be elevated in the head injured population because if you have a significant head injury you can be depressed and you

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can have loss of anger management issues which is scale 4 coming up, the -- the antisocial scale. So what you do is you look at his individual responses to make sure that he's not endorsing the same questions TBI patients endorse to elevate those scales. It's called a Gass adjustment, G-A-S-S, for the researcher that created that adjustment profile. And in Reginald's case there were no Gass items so that means that the 2, 4, 6 profile is not related to the head injury, it's chronic and it's been there forever.

Q. Okay. So what does that mean?

A. Reginald has antisocial personality disorder.

Q. Okay. And what is antisocial personality disorder?

A. It's an aberration of -- well, let me do it this way. If you -- if you look at the 12 personality disorders that exist, like antisocial, narcissistic, avoid and schizoid, if you look at those disorders -- all of our personalities are made up of those disorders. I have 12 personality disorders, so to speak, inside of me and you have 12 inside of you and everyone else in this room has 12 of those disorders. What makes us not disordered is that we pick and choose which section of our personality we're in at the appropriate time. So like, for example, you know, antisocial personality is kind of the person who's against

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authority. And so if I'm in a situation where I think I need to put my bars up, so to speak, and to hold off someone who I find threatening, I step into my antisocial component of my personality and recognize my right to review authority. And if I'm with somebody that I'm really uncomfortable with and I want to get away from them, I kind of step into my schizoid compartment and I make excuses to withdraw.

What makes a person disordered is they're are unable to pick which 12 compartments they are in. They stick in one all the time. So when you're at a party, you're antisocial; when you're at work, you're antisocial; when you're with your girlfriend, you're antisocial. And that's what makes a person disordered.

And in Reginald's case, the antisocial personality will show itself in difficulties with anger management and difficulties with authority which is the two hallmarks of antisocial personality disorder. There is no treatment for a personality disorder. It's something that he was given, so to speak, in life, somewhere between birth and the fifth year of life. It's something that occurs very early in the first five years of life. And it eventually manifests itself by the adolescent years.

[p.43]

Q. Okay. Does antisocial personality disorder necessarily mean that you're going to be a criminal?

A. It does not necessarily mean that you're going to have a criminal history. When I was going through school the professors tried to get us to understand just the personality disorders by seeing movie characters that could stick in our head, so to speak. And if you were -- if you thought of, like, Hannibal Lector, for example, he would not be the antisocial personality character in a movie. James Bond would be your antisocial personality. So again, not a criminal, but a person who liked to exercise his right to deny authority or authoritative lines. So it's not necessarily a dangerous person, but it is one who has their own social norms and they break others.

Q. So what kind of personality disorder would Hannibal Lector be?

A. He's probably narcissistic or paranoid which are the two dangerous personality disorders.

Q. Okay. What -- what -- in your report you talk about some of the profiles and things that would manifest themselves because of this personality disorder; is that correct?

A. I'm not sure where you got that, Mr. Greeno.

Q. Well, I'm not sure where I --

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A. -- understand your question.

Q. I'm not sure where I got it either. There's a section in your report when you talk about in addition to -- the addition of scale 2, depression, to the 4, 6, 6, 4 --

A. Thank you.

Q. -- do you see what I'm taking about? What is that all about?

A. Basically what I do on these forensic evaluations is you can kind of -- you can freely interpret the MMPI because it looks kind of like an EKG. And you can just kind of scan it and see that it's a 2, 4, 6 and say, well, this person is depressed, scale 2, this person has antisocial tendencies, scale 4, and this person has a lot of distrust, scale 6. But in forensic settings, what I prefer to do is quote the literature so that people don't think I'm just winging it on the interpretation. So what I did is quoted the literature for a 2, 4, 6 profile which talks about the three things I've already talked about.

Q. Okay. What about this -- there's a mention in there of diagnosis of borderline personality.

A. Yes. A 2, 4, 6 on the MHPI has a high rate of being borderline personality disorder. That's one of the 12 we've already talked about. And that's one of the

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reasons why you do the MCMI-III, the one that looks at old and new issues because the MCMI has actually all 12 scales for all 12 personality disorders on it. So you can look at the MCMI-III to kind of help you understand what personality disorder is on the MMPI-2. And on the MCMI-III it was antisocial and not borderline.

Q. Okay. Was that profile used to determine if there were any traumatic brain injury factors?

A. Yes, that's what I mentioned earlier about the Gass adjustment. You look to see whether or not any of this 2, 4, 6 was created by Mr. Carr having a brain injury. And there were no Gass items indicated so it -- this 2, 4, 6 is -- has nothing to do with having a dysfunctional brain.

Q. What about the MCMI-III, was there anything that you learned in addition from the MMPI from that test?

A. Yes, again it supported the antisocial personality disorder. It also showed that Mr. Carr has difficulties with substance abuse.

Q. Okay. In summary, what did all of this testing tell you?

A. Somewhere in Mr. Carr's life he had significant head trauma or traumas with a number of knockouts. It could be any number of times he would have had

[p.46]

sufficient impact to cause brain damage. More than likely the trauma we're looking at, though, was not recent, it was probably quite old, somewhere in the first eight, nine years of life. And the reason for that is because of the fact his achievement scores are kept up to pace with his eighth grade education. And he basically has a damaged brain.

Q. Were you able to -- to opine as to where the brain was damaged as a result of these tests?

A. Well, remember, the things we've talked about so far is the fact that on IQ we had this very terrible

left hemisphere and also we had very poor auditory verbal memory in one area on the left hemisphere. So the left hemisphere's probably the worst hemisphere that Mr. Carr has. That's the left side of his head. And that's where school is at which would also support why he did very poorly in school.

We also found some damage on the right-hand side, not as significant as on the left-hand side. And whether or not both occurred at the same time or he got three or four different blows, there's no way to sort that out, or whether or not it was even a birth trauma issue in addition to other blows from physical abuse because, again, I don't have birth records and I just know that supposedly he was in the

[p.47]

hospital a long time.

Q. Did Mr. Carr view himself as a brain-damaged individual when this testing was done?

A. That was the first thing I asked Mr. Carr in the interview because I wanted to have a feel for whether or not a patient knows that they are TBI and that means that they may have been told about the TBI life-style. When we work with TBI patients, when we're releasing them to kind of go back into the community, we teach them about the TBI life-style it's called. And to educate the person to make good choices. And I wanted to make sure that he hadn't heard that which means then he would have obviously had that discussion sometime in the past with either a doctor or a parent.

Q. Well, what kind of -- what kind of a T -- you mentioned TBI life-style, what is that?

A. A person with a head injury has to make some wise choices to prevent that head injury from ruining their life. For example, we get them off caffeine. Caffeine is a large problem for head injured individuals. Just like bright lights can be a problem and a lot of noise can be a problem because they're stimulations. Caffeine is our only legal stimulant and most people overconsume caffeine. And so a head

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person injured person who overconsumes caffeine will have difficulties in the areas of their deficits as well as emotional control.

We try to get them to be abstinent. They cannot drink alcohol. Alcohol is a toxin, just like illicit substances. So we try to keep them off any illicit, recreational drugs. Because if they do not do that, they are adding problems. And the two ways we tend to see the problems occur is either in a very passive life-style, you kind of became paperweights or slugs, lack of initiative, or they become violent and aggressive.

Q. Does it sometimes manifest itself in the loss control?

A. That's what I was meaning in terms of aggression or violence.

Q. Okay. In this particular situation, would you -- were you curious as to what Mr. Carr had ingested on the date of the crimes that he was charged with?

A. He reported that he had used alcohol and marijuana.

Q. What would that tell you?

A. He wasn't living a TBI life-style.

Q. What about the -- what did you find in regard to the presence or what significance did you make out of the finding of the chronic personality problems?

A. Well, again, as I mentioned earlier, personality

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disorder, you cannot treat it. I mean a person was made this way in the first five years of life, usually by a family situation. There's no pills to throw at it, there's no therapy you can do. So since you're looking at a person who not only has head injury, you're looking at someone with a chronic personality disorder, you're going to have -- think of it this way.

If Mr. Carr was a regular patient, not a forensic client, we would typically place him on a medication like Tegretol or Depakote because it works very well for mood control and anger control. We get them on a TBI life-style, swearing off caffeine, illicit substances, alcohol. But with a person who would be a patient, not a forensic client, who also came in with an antisocial personality disorder, we would be worried about compliance because, remember, the antisocial person wants to go against lines of

authority. I'd be a line of authority and so I have difficulties with my patients who are antisocial who have medical problems with compliance. So the likelihood that Mr. Carr would follow through with the use of proper medications and with a TBI life-style is probably unlikely.

Q. Okay. So within the contents of the forensic

* * *

[p.76] [*Cont. Cross-examination of Mitchel A. Woltersdorf by Mr. O'Connor*]

question. And that there is something wrong with my mind; he answered false. Which would be consistent with the other answers about there's no little voices in his head.

A. Correct.

Q. He answered true to the question that I'm entirely self-confident. And at the -- I believe it's getting near the end of the MMPI-2, there are questions that said -- one of the questions is at times I have been so entertained by the cleverness of some criminals that I have hoped that they would get away with it; and he answered true. You wouldn't disagree with that?

A. No, the only -- keep in mind, though, that in the report I mentioned that the second half of the test was malingered.

Q. Okay.

A. So you may find once you get past Question 370 that there may be some inconsistencies.

Q. Well, this is Question 250.

A. Okay.

Q. So this is the valid part of the test.

A. Okay. When you said the second half, I thought you were near the end.

Q. I thought -- well, for me 250 is a lot of questions.

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A. It's 567 total.

Q. 263, so we're still in the valid part of the test, where's he's -- at least what you can determine from your tests is that he's telling the truth?

A. Yes.

Q. Mr. Carr answers false to the question I am always disgusted with the law when a criminal is freed through the arguments of a smart lawyer; he answered false, you wouldn't disagree with that?

A. No.

Q. Okay. Now, we talked about this a little bit, some of the things he told -- and I believe you've agreed with me that some of the things he told you appear to be inconsistent, at least with what he told Mr. -- or Dr. Reidy.

A. It appears so on the surface, yes.

Q. At least the part about losing consciousness. Now he talked to -- now we know that he talked to Reidy actually -- or Dr. Reidy over a year later than when he talked to you.

A. Yes.

Q. Would that be consistent with somebody who is -- could be consistent possibly, you wouldn't be able -- you can't predict, but could it be consistent with people that are crafting a social history?

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A. Yes, it could be.

Q. And that's not to say that based upon what you've talked to Mr. Carr about that he didn't have a perfect childhood, but it would be consistent with maybe somebody trying to make it worse?

A. It's possible. But again, remember, my interview was more concerned with the neurological components of his life. I didn't pursue any of the parental or familial or sexual issues.

Q. And you were not provided with from -- you were not provided with documentation of these head injuries where he said he lost consciousness?

A. That's correct.

Q. Okay. And one of the things I believe you discussed is that he told you that he spent a great deal of time in the hospital after birth.

A. Yes.

Q. What the evidence has come out is that he was premature and that he was jaundiced. And, you know, for example, my first child was premature, spent a long time, he was jaundice too, and all of my kids have been jaundiced. That's not unusual; is that correct?

A. That's correct.

Q. So it was explained to this -- in-court testimony is

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that there was no brain injury when he was born, it was just simply premature.

A. Thank you.

Q. Now, there was -- and I don't -- I think you were aware of that there was an MMPI-2 and an MCMI done back in 1996 on Mr. Carr.

A. Actually, I was aware of the MMPI-2. I was not aware of the MCMI-III.

Q. And in that -- in addition to a provisional diagnosis and diagnosing him as antisocial personality disorder, they also go on and give clinical impressions. Were you -- did you have access -- were you provided with this?

A. No.

Q. Okay. And I believe that you would say it doesn't really make a difference because they come to the same diagnosis but, nevertheless, you were not provided with this?

A. Correct. I was aware of it. I did not have the actual profiles.

Q. Mr. Carr in this clinical impression, it appears he talked to whoever performed these tests on him. And this was after the convictions out of Dodge County that -- or Dodge City that you may not know

of or care about, but that's why they were doing this. I believe

* * *

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CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SEDGWICK)

I, Sandra J. Berger, a Certified Shorthand Reporter, and a regularly appointed, qualified, and acting Official Reporter of the 18th Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in **Case No. 00 CR 2978, *THE STATE OF KANSAS, Plaintiff, v. REGINALD D. CARR, Defendant,*** and **Case No. 00 CR 2979, *THE STATE OF KANSAS, Plaintiff, v. JONATHAN D. CARR, Defendant,*** heard on the 8th day of November, 2002, before the Honorable Paul W. Clark, Judge of Division No. 9 of said Court.

I further certify that at the request of Debra J. Wilson and Rebecca E. Woodman, Capital Appellete Defenders, a transcript of my shorthand notes was typed by me or under my supervision via computer-aided transcription, and that the foregoing transcript Volume 44, consisting of 120 typewritten pages, is a true copy of all of the proceedings, all to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal at Wichita, Kansas, this 21st day of March, 2003.

/s/Sandra J. Berger
SANDRA J. BERGER
CERTIFIED SHORTHAND REPORTER

SANDRA J. BERGER, CSR
Official Court Reporter

IN THE EIGHTEENTH JUDICIAL DISTRICT DISTRICT COURT, SEDGWICK COUNTY, KANSAS CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 12, 2002]

THE STATE OF KANSAS,

Plaintiff,

vs.

REGINALD D. CARR, Jr.,

Defendant.

THE STATE OF KANSAS,

Plaintiff,

vs.

JONATHAN D. CARR,

Defendant.

VOLUME 45A
TRANSCRIPT OF JURY TRIAL
NOVEMBER 12, 2002

Proceedings had before the Honorable Paul W. Clark, Judge of Division No. 9 of the District Court of

Sedgwick County, Kansas, in the Eighteenth Judicial District, at Wichita, Kansas, on the 12th day of November, 2002.

APPEARANCES:

Ms. Nola Foulston, District Attorney, Ms. Kim Parker and Mr. Kevin O'Connor, Assistant District Attorneys, Sedgwick County Courthouse, 535 N. Main, Wichita, Kansas 67203, appearing for the State of Kansas.

Mr. E. Jay Greeno, Attorney at Law, 250 N. Water, Suite 215, Wichita, Kansas 67202, and Mr. John V Wachtel, IV, Attorney at Law, Klenda, Mitchell, Austerman & Zuercher, 301 N. Main, Suite 1600, Wichita, Kansas, 67202, appearing for the defendant, Reginald D. Carr, Jr.

Mr. Ron Evans and Mr. Mark A. Manna, Attorneys at Law, Death Penalty Defense Unit, 112 S.W. 6th, Suite 311, Topeka, Kansas 66603, appearing for the defendant, Jonathan D. Carr.

CONNIE UPHAUS, CSR

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FOR THE DEFENDANT, JONATHAN D. CARR

MARK DOUGLAS CUNNINGHAM, Ph.D.

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CONNIE UPHAUS, CSR

* * *

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THE COURT: Ms. Marquez, bring the jury, please.

(at which time, the jury entered the courtroom, after which the following:)

THE COURT: Good morning, members of the jury. I trust your Veteran's Day was a good holiday. We're ready for the next witness. The lawyers have agreed to call the next witness out of turn. Ms. Uphaus, administer the oath, please.

(at which time, the witness was sworn by the court reporter, after which the following:)

THE COURT: Mr. Ron Evans for defendant, Jonathan Carr.

MARK DOUGLAS CUNNINGHAM, Ph.D., having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. EVANS:

Q. State your name for the record, please.

A. Mark Douglas Cunningham.

Q. You know, Dr. Cunningham, it might be easier if you take the chair behind you until the PowerPoint presentation starts.

A. (witness complies.)

Q. What's your occupation?

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A. I'm a clinical and forensic psychologist in private practice.

Q. Where is your home?

A. Lewisville, Texas. It's a suburb of Dallas.

Q. How long have you been a psychologist?

A. About 24 years.

Q. Please explain to the jury what is a clinical psychologist?

A. Clinical psychology is the evaluation and treatment of psychological disorders.

Q. What's a forensic psychologist?

A. Forensic psychology is the application of psychological research and techniques to legal issues. It's any way that psychological research or -- or interviews or information can be helpful in some issue that's before the court, all the way from evaluations in child custody situations in criminal court, things like competency to stand trial or mental state at the time of offense or sentencing determinations, such as are being considered today.

Q. Now, you've been licensed as a psychologist various places; is that true?

A. Yes, sir.

Q. Where?

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A. Well, I was initially licensed as a psychologist in Connecticut when I was a psychologist with the Navy there. I then moved back to Texas and am currently licensed in Texas, Louisiana, Arkansas, Tennessee, South Carolina, Indiana, Illinois, Colorado, Idaho, Oregon and New Mexico. I may have left one out. Eleven states in all.

Q. So your practice is national in scope?

A. That's correct.

Q. How long have you been licensed?

A. I was first licensed in Connecticut in 1979 or 1980.

Q. So about --

A. About 22, 23 years, yes, sir.

Q. Now, give us a brief summary of your educational background as it relates to psychology.

A. Well, I received my undergraduate degree with high honors from Abilene Christian College in 1973. I then attended graduate school at Oklahoma State University in a doctoral training program that was accredited by the American Psychological Association as a clinical psychology doctoral training site and got both my Masters and Doctorate degrees in clinical psychology from Oklahoma State.

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DIRECT EXAMINATION (CONT'D)

QUESTIONS BY MR. EVANS:

Q. Dr. Cunningham, so the record is clear, you were asked about a letter that you sent to the Department of Justice, that would be to Ms. Peggy Griffey; is that right?

A. That's correct.

Q. She's the director of the capital case unit, United States Department of Justice. You sent that to her in Washington D.C.; is that right?

A. That's correct.

Q. You've also sent a letter to Dr. -- Mr. Lindsey Roberts, the training director for the Texas District Attorneys Association; is that right?

A. That's correct. I was offering to provide training seminars free of charge to prosecutors. The one to Ms. Griffey involved both an offer to provide education services to U.S. attorneys as well as to provide consultation in a capital case free of charge, up to a hundred hours.

Q. Also, you sent a letter to Mr. Alan Levy, chief of the criminal division of the Tarrant County DA's office. That's in Forth Worth, Texas; is that right?

A. That's correct, also offering to provide

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training for his staff, free of charge, and offering to consult on a state capital case in the Dallas area where I live free of charge up to 80 hours.

Q. Turning to this case -- Jonathan Carr.

A. Yes, sir.

Q. What information did you gather or review in preparation for your testimony today?

A. Well, I interviewed a number of people. I interviewed Jonathan Carr first in April of 2001 for four and-a-half hours. I saw him again, then, the next April of 2002 for about an hour. Also in April 2002, I interviewed his mother, Janis Austin, for just a little less than three hours -- two hours and 52 minutes. I interviewed Phyllis Harding, his maternal aunt, for an hour and five minutes. I interviewed Temica Harding, his sister, for an hour and 45 minutes. I subsequently did a number of telephone interviews. I had a telephone interview of Temica Harding for 11 minutes. I had a telephone interview of Bernice Demetrius -- she goes by Demetrius -- White, who is a paternal aunt. This is the sister of Reginald, his father. I interviewed her by phone for an hour and 10 minutes. Then I called her back and -- and

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interviewed her for 20 minutes. I subsequently called her back again and interviewed her for six minutes. The callbacks were to seek additional information and to try to clarify any discrepancies of reports that I heard. I interviewed Jennifer Fayad who is a frateral

cousin. This is Demetrius' daughter who grew up with Reggie and Jonathan and Temica and interviewed her by phone for 24 minutes.

Q. Ms. Fayad would be approximately the same age as Temica; is that right?

A. That's correct. They are like a month apart in age.

Q. Okay.

A. I did a telephone interview of Dorothy Wiley, who is the paternal grandmother for 45 minutes. Telephone conference call between Demetrius and her mother, Dorothy, for three or four minutes, again, to clarify the history that I was getting. I had a telephone interview of Roshell Cossman who is the mother of Devin, one of Reggie's children. I talked to her by telephone for 14 minutes, and then I interviewed Anita Lumpkins who is a stepmother of Jonathan and Reggie. This is who Reginald, their father, married after he left Janis and they were married for two to three years and had two children

* * *

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damage ends up being expressed in other ways. So instead of moving into criminal violence, they are more likely to become sexually active early, to have a child out of wedlock, to marry early, to be in abusive relationships. They have problems with depression and anxiety. Their lives are significantly impacted; just not in a criminal way. And you can see this even in terms of demographics that about 90 percent of prison inmates are male, and that proportion is that high or

higher for violent offenders. And so being female is a very significant protective factor.

Intelligence is a protective factor, assuming that you are somebody who is extremely smart, you are college bound, and so then when you get to school, school is a place of great success for you, and however chaotic or out of control things are at home, when you get to school, that's a place that you succeed and you get a lot of strokes and people begin to mentor you and that opens up other avenues for you to go into.

A positive social orientation identifies -- this and the resilient temperment -- means that -- the kid can simply tolerate and weather a good deal of adversity and keep striving

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to the top. Those of us that have had more than one child realize that our kids are different from the moment they were born in terms of their ability to tolerate changes and stress and relocations and other things, and some of them are just hardier than others and have a more naturally positive bend in their relationships. Now, Jonathan does have some elements of positive social orientation in that he was described by his family as being tender-hearted, affectionate, sensitive to others' feelings in the household, that he was the one to get his mother -- get his mother flowers or crawl up in bed with his aunt and put his head on her shoulder, even as a teenager, that there were elements of his disposition that were more positive in terms of social relationships, but did not appear to have had a resilient temperament.

The social bonding to positive role models was quite limited in his family. The family members in his immediate household were not modeling positive behaviors. And his contact with other family members, Demetrius' family or Dorothy Wiley, his grandmother, were disrupted and infrequent enough, he's just not there long enough to really become part of that value system and

[p.58]

world.

Q. Immediate family members, we're talking about Janis?

A. Janis. Reginald. Rick.

Q. Reginald, Senior?

A. That's right. Reggie. Immediate family.

Q. Now, family members, aunt Phyllis -- looking for a positive role model, aunt Phyllis is a physician -- she's a medical doctor. She has been here. The jury has seen her testify. Isn't that a positive role model?

A. Yes, sir. Although, again, his contact with her is intermittent. He's not around her much at all as she is in medical school and then she began to work as a physician across the early years of his life. He does go to live with her in Brownsville when he's about nine years old and she described him as there for third and fourth grade. He's there a couple of years, then later he lives with her again in Wichita Falls, but we are getting pretty late in the game by the time that he's nine.

Q. Late in the game. You mean late in adolescence?

A. Late in the childhood game, late in the identifying with your family members and seeing

[p.59]

this is the person that emulates, that -- that is better than being 19 when that starts, but you have lost some pretty important years in the meantime. And then it's not continuous. He's with her for a year or two, and then back with her again and not on an ongoing basis where he is in a position to really become her child and adopt her value system.

Q. You were working your way through that model. Continue, please.

A. There are apparently teachers and coaches that responded positively to Jonathan, although he's moving so much as he is shifted from one family member to another, that there's little opportunity to be in a longstanding, mentoring relationship. He has difficulty making friends. Again, he's moving repeatedly and so his peer group is disrupted. And he's having learning disability problems as well. There are not healthy beliefs or clear standards of behavior in his family of origin with Reginald and Janis or with Janis and Rick, and there were not effective interventions. At the time that he is -- that he is sent away following this allegation of being involved in a group rape of a peer-aged girl when he was nine years old. The response to that was to send him to his aunt

* * *

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A. That's correct. He has four of five school factors, two of three peer factors. Again, the poverty is a -- that perhaps should be plus-minus. There is a subjective experience of it in terms of -- as I described the meals and that ultimately his sister is buying clothes for him and that sort of thing as she begins to work, but not a general household level of poverty. And he has four, perhaps five of those factors, depending on how you read the poverty.

Q. The community and neighborhood factors -- he's got all five of those?

A. Yes.

Q. Four or five of those?

A. At least four or five of those, again, depending on the neighborhood. Some of the neighborhoods that he's in are better than others. Others that he's in, there are a significant amount of drug trafficking that appears he may be involved in.

Q. I see situational factors down at the bottom. What's that?

A. Yes, sir. Situational factors are what the Justice Department identify as being the events that converge together that result in the offense

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or there are some instances where the person may be engaged in a long series of criminally violent behaviors, and there being violence or a homicide in this one is really something that could have happened all the way

along, the life style the person's involved in. There are other cases where there's a sense that but for these factors coming together at the same time, you wouldn't be here. And those are called situational factors; factors that come together. Reggie's presence may be a situational factor or who comes to the door may be a situational factor.

Q. Well, there were 26 risk factors?

A. Approximately.

Q. How many does Jonathan have?

A. Twenty-four.

Q. How would you characterize that?

A. Catastrophically cumulative.

Q. Are there any other additional factors for violence in the community in addition to those detailed by the Department of Justice, Dr. Cunningham?

A. Oh, yes, sir. One of the most powerful factors related to violence, aggression in the community, is being male and being youthful, being young.

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Now, the Justice Department doesn't list that out as a separate factor because they are trying to look at what causes the violence, or adds to that likilihood among young -- late adolescent young adult males. They don't break that out separately, but this is its own very significant risk factor that can be demonstrated with a number of research studies.

Q. Can you provide some evidence of this relationship between youthfulness and violence?

A. Yes, sir. This is a -- this is a study that was published in 1990 that is called -- the fancy title of it is epidemiologic catchment area survey. That's a fancy way of saying they're -- etiological -- they are looking for the cause of violence, and so they go out into the community and they interviewed intensively 5,000 community residents, took all kinds of information from these -- these individuals. And this study is unique because it's not based on arrest records. They are asking people about their violence experience in the community. This is the percentage that are violent in any given year and this is the age of the individual. And so, for example, if you're a male between the ages of 18 and 29, you're not from the

* * *

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begin to medicate himself with drugs and alcohol when he gets into a zone of having access to them.

Q. Can you describe the progression of Jonathan's alcohol and drug use?

A. Yes, sir, I can. He reported to me that at age eight, he was given Thunderbird wine and grape Kool-Aid by maternal half-uncle, Charles. This would be a child of his grandfather on that side of the family and Helen Harding, who was a subsequent relationship. He then described at that time that he got drunk and -- he drank so much that he got drunk and he passed out and he awakened to vomit.

Q. This was when he was how old again?

A. Eight years old. That also is a very ominous sign that the person, the first time they have anything to drink, they get very drunk until they pass out. That's an ominous sign about the affect that alcohol has on them and they're continuing to ingest it even after they are becoming intoxicated. He described that every, about weekly after that, he would go to uncle Charles' house with Reggie and they would all get drunk, that uncle Charles and Reggie would often have a girl there. Jonathan would drink until he passed out.

Q. Talking about his brother, Reggie?

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A. That's correct. That after age eight on trips back to Cleveland when he would go back there, that he would again get drunk with his uncle Charles. He described that between ages 15 and 19, that when he was in Dodge city, during those years in Dodge City in high school, that he would get drunk all weekend. And then at age 19, he would get drunk every other weekend when Reggie visited, that that was a joint activity for them. In terms of marijuana, he described that he first smoked marijuana at about age 13 with Reggie. That in Dodge City, he would smoke blunts. These are cigar-like rolls of marijuana as opposed to joints, which are cigarette size. That they were smoking blunts every day, all day, that Jonathan and Reggie were. He described that he smoked one to two times monthly while Reggie was in prison. And then again, after Reggie's release from prison, when Reggie would visit, they would smoke marijuana heavily together.

Q. Self medication, that's a term that people hear these days sometimes. What does it mean?

A. Well, self medication means that, typically, that you have an adolescent, sometimes an adult, who is troubled by other emotional issues, and the

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way they deal with that is to medicate themselves with drugs or alcohol.

Q. Do you think that has some application here to Jonathan, that term self medication?

A. Oh, yes, sir. There is very significant developmental abuse and neglect and disruptive relationships in his life that he would be carrying around a good deal of emotional pain as he came into adolescence and would be a prime candidate to begin to self medicate.

Q. You were talking about his use of marijuana.

A. Yes, sir. I described that as occurring at age 19 after Reggie's release from prison. They would smoke heavily when Reggie visited. He reported that in terms of the hallucinogenic mushrooms, that he used those routinely for about a month at age 18, and then stopped because he was getting delayed hallucinations. He was getting hallucinations that were occurring even well past when he had ingested the mushrooms.

In terms of PCP, which is typically smoked on a cigarette -- either a tobacco cigarette or a marijuana cigarette that is dipped in a fluid of PCP and typically embalming fluid and depending on where the person lives, they may call these sherms

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or wet, and it's smoked. Jonathan told me two things about the PCP The first time I talked to him, he described that he had smoked wet at age 19, but that the last occurrence of that had been a number of months prior to this offense. What I -- I subsequently heard through defense counsel was that he was reporting to others that he was smoking PCP on the night of this offense. And so when I came back into town this morning, I asked him about that, and said, so, tell me -- you told me this before; tell me what your PCP use was. And he described that he had smoked PCP within 30 minutes or an hour of this offense. I -- I simply give you what I have heard. I don't know when he was smoking PCP and when he wasn't. There is some discrepancy in the two reports that he gave me.

Q. PCP -- what is that?

A. Phencyclidine, which is a -- was initially developed as an animal tranquilizer and was subsequently discovered to have some abuse potential. It -- it has a number of nervous system effects, promotes disruptive behavior, difficulty feeling pain, disruptive judgment, disruptive thought processes.

Q. Does that give you reason to believe that

* * *

[p.146]

STATE OF KANSAS)
) ss.
SEDGWICK COUNTY)

CERTIFICATE

I, Connie Uphaus, a Certified Shorthand Reporter for the State of Kansas, certify that I was present at and reported in machine shorthand the proceedings had in the case of State of Kansas v. Jonathan D. Carr, Case No. 00 CR 2979; and State of Kansas v. Reginald D. Carr, Junior, Case No. 00 CR 2978 before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of Sedgwick County, Kansas, at Wichita, Kansas.

I further certify that the foregoing transcript of my shorthand notes is a true and accurate representation of all of the proceedings contained herein, to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, this _____ day of _____, 2002.

_____
Connie Uphaus, CSR

CONNIE UPHAUS, CSR

IN THE EIGHTEENTH JUDICIAL DISTRICT DISTRICT COURT, SEDGWICK COUNTY, KANSAS CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 12, 2002]

THE STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
v.	)
	)
REGINALD D. CARR, JR.,	)
	)
Defendant.	)
	)
THE STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JONATHAN D. CARR,	)
	)
Defendant.	)
	)

VOLUME 45B
TRANSCRIPT OF JURY TRIAL
NOVEMBER 12, 2002

Proceedings had before the Honorable Paul W. Clark, Judge of Division No. 9 of the District Court of

Sedgwick County, Kansas, in the Eighteenth Judicial District, at Wichita, Kansas, on the 12th day of November, 2002.

APPEARANCES:

Ms. Nola Foulston, District Attorney, Ms. Kim Parker and Mr. Kevin O'Connor, Assistant District Attorneys, Sedgwick County Courthouse, 535 N. Main, Wichita, Kansas 67203, appearing for the State of Kansas.

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Mr. E. Jay Greeno, Attorney at Law, 250 N. Water, Suite 215, Wichita, Kansas 67202, and Mr. John V. Wachtel, IV, Klenda, Mitchell, Austerman & Zuercher, Attorneys at Law, 301 N. Main, Suite 1600, Wichita, Kansas, 67202, appearing for the defendant, Reginald D. Carr, Jr.

Mr. Ron Evans and Mr. Mark A. Manna, Attorneys at Law, Death Penalty Defense Unit, 112 S.W. 6th, Suite 311, Topeka, Kansas 66603, appearing for the defendant, Jonathan D. Carr.

CONNIE UPHAUS, CSR

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CONNIE UPHAUS, CSR

* * *

[p.24] [*Cont. Direct Examination of Mark Douglas Cunningham, Ph.D. by Mr. Evans*]

participation in the physical abuse of each other. The next one is potential sexual abuse.

Q. Is sexual trauma limited to direct physical, genital contact?

A. No, sir, it's not.

Q. What other kinds of sexual exposures may be traumatic or injurious to a child?

A. Well, in some ways, this makes some common sense. You think about what is it that I don't want my little kids to be exposed to on a sexual channel that I think might be destructive to them. Well, one of those things is exposure to graphic sexual behavior, either to see videos, pornographic videos, to observe parental sexual activity, to see photographs of those things. A sexually perverse family atmosphere where there is too much sexual information that is being banded about like the allegations of infidelity or the sexual abuse of another child in the home.

Premature sexualization, that means that the child is becoming sexualized much sooner than they should, and so if they are interacting genitally, sexually, having intercourse at age seven, eight, nine, 10 instead of age 18, 19, 23, that's way out of phase. And that precocious, that

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premature sexualization, ends up being damaging to development. There's observed sexual abuse or assault, seeing someone else mistreated sexually, and then there is direct physical, genital sexual abuse.

I have check marks beside the elements that Jonathan described were present in he and Reggie's life, and I've got question marks beside the ones that I'm uncertain of. For example, it's unclear regarding the observed sexual abuse or assault. There's no indication that Jonathan actually saw Temica being sexually abused or whether he was aware of that at the time. It's possible. In terms of the direct physical sexual abuse, Demetrius described that both of the boys separately came to her and told her that they were being sexually abused by one of mom's boyfriends or that the other one was being sexually abused. Jonathan came to her and said that Reggie was being sexually abused by one of mom's boyfriends. She described that Reggie came to her and told her that Jonathan was. But each boy denied that he was when she talked to them directly.

Q. This is information as per Demetrius?

A. That's correct.

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Q. Specifically, what sexually traumatic experiences has Jonathan suffered?

A. Well, the allegations of marital infidelity between his parents that were recurrent source of conflict. Demetrius reported that men came in and out of the

house following Reginald's exit. Temica reported that her father had fondled her genitals and had tried to penetrate her. I described Reggie and Jonathan's independent report to Demetrius. Jonathan reported that he was -- when he was about six or seven, that Reggie prompted a peer-age girl named Amber to begin having sexual interactions with Jonathan. Apparently she had already been involved with Reggie. She was about the same age as they were, I think a year older than Jonathan, and Jonathan described that that involved both filacio and intercourse when he was seven years old. Now, it's my understanding that -- from Dr. Reidy that Amber has denied that these events ever took place. But Jonathan described that these were early sexual experiences that he had.

Then as a -- as a third grader, Jonathan was accused of raping this girl, this peer at a group rape at the Harvey Rice elementary school. He reported that his father subsequently withdrew

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from him. His peers began to ridicule him and then he's sent off to live with Phyllis. Either way you cut it, this is a disastrous event in the sexual development of this young person. That one possibility is that he has already been sexualized into an assaultive pattern -- in an assaultive behavior at age nine which is -- cries out for vigorous exploration, investigation and treatment for this young person. Alternatively, he's been falsely accused of this, had this label put on him and has been expelled from his family, and so either -- whatever happens there, this is a disastrous event in the developmental trajectory of the sexuality.

Jonathan reported that while residing with aunt Phyllis in Brownsville, that he had intercourse a couple of times with a 19 year old female. At this point, he would have been 10, 11 years old. I don't have any confirmation of that. That's what he described. And then he also described that he had had exposure to explicit pornographic videos and photographs at around age 10 or 11, some of those involving material that an uncle, I think, had that they ended up having access to and some involving photographs and video

* * *

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A. Yes, sir. Quite simply, if I might just direct to the bottom here. Quite simply, conclusion of the research is that a lack of parental discipline contributes to aggressiveness and predisposes to violence in the community.

Q. Now, back to the outline that you've been following about software. What sorts of values and models of behavior? Describe these models and values that Jonathan had growing up.

A. Well, there is parental neglect and parental irresponsibility and the behavior of his parents and the abandonment of his father. There is alcoholism or drug abuse by his mother, his father, his stepfather. Janis and Rick, according to Jonathan, maintained sporadic employment. There were varying -- Jonathan and Temica described, and Jennifer indicated that she had been told of this, as the kids were growing up, they described that Rick was involved in chopping down stolen cars and that he involved Jonathan and Reggie in this activity. After I had learned that from Temica,

I asked Jonathan about it. He indicated that had been the case. He had not told me that in the first interview, as I recall. I asked Jennifer about it or about Rick and she indicated that she

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had heard this when she was growing up. Temica described that Rick would hide at his mother's house and later moved to Kansas to avoid law enforcement. Now, Janis denies this. Janis denies that Rick was ever involved in any illegal activity, so there's discrepancy in the family system about -- about this.

Jonathan believed that Rick was involved in selling and using drugs, but there is no other evidence of that. Jonathan described that Reggie was gang involved and dealing drugs from age 13 and that he looked up to Reggie. Jonathan also -- well, Temica described that Reggie would ridicule Jonathan as being weak, a wus, and other -- other disparaging adjectives about his lacking masculinity when he didn't do what Reggie wanted him to do. And then there were descriptions of Temica, Demetrius that Janis condoned the misconduct of the boys, that she didn't set limits on them.

Q. Okay. We discussed Jonathan's family background in some detail. I want to go back to the study you talked about earlier. This is the FBI Behavioral Science Unit which is -- was investigating the origins of sexual homicides.

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A. That's correct.

Q. What did those FBI investigators discover about the family background of these offenders?

A. That there was inconsistent contact between family members, and poor attachment. That there was neglect, instability of home structure, father absence, unsatisfactory relationship with the father or the father figure. No constructive older sibling role model, particularly older role models of the same sex, feelings about mother that were very conflicted, family history that involves physical and psychological abuse, family sexual problems, sexual abuse and witnessing disturbing sex.

Q. Again, according to the FBI's researchers, these family problems aren't an abuse excuse or an attempt to blame someone else, are they?

A. No, sir. They are looking at what's their best understanding of some of the core causes that go into the development of an offender who could engage in this sort of sexually-driven violence.

Q. How many of these factors are present in Jonathan and Reggie's background?

A. Virtually all of them. The sexual abuse itself is potential, as I indicated, depending on whether

* * *

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MS. PARKER: I object to the non-responsive nature.

THE COURT: I'll sustain the objection.

Q. Tie all this together. How does this relate -- the things that you talked about the last several hours, how does it relate to this offense?

MS. PARKER: Your Honor, I would object because if it's going to repeat what's already been said, it's repetitive.

THE COURT: It sounds like it's asking for evidence that is repetitious, cumulative.

Q. Do you have a way to tie this up that's not repetitious?

A. Yes, sir. I have a model that I've created.

THE COURT: I think I'll decide what is and is not repetitious. It sounds like it calls for repetition since we've heard it already.

Q. Has the jury seen the model?

A. No, sir.

Q. Does the model have information in it presented in a different way that might aid and assist them in some determinations they are going to have to make in this case?

A. I believe it would.

MS. EVANS: Ask that he be allowed to show

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the model, Judge.

THE COURT: I'll allow it.

A. We have an individual with some very problematic genetic predispositions who, in addition to that, has neurological abnormalities that impact on them, and this person with these genetic predispositions and neurological abnormalities then grows up in a catastrophic family setting, and out of that comes substance abuse and disturbed adjustment that are aggravating each other during adolescence. Out of that, you have the influence of his older brother and intoxication at the time. And from that, you have the capital offense.

Q. As you interviewed Jonathan and you interviewed members of his family, did you find that Jonathan is just damaged and that's all there is to it?

A. No, sir, I did not.

Q. How could someone be damaged and have good things about them at the same time? The jury has heard the Culvers folks from Dodge City. They've heard Jessie Harris come in from Cleveland. They've said good things about Jonathan. You've described a damaged individual. How are those things consistent?

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A. People aren't either all benevolent or all damaged. A psychiatrist that I worked with in the Navy said that people are like Swiss cheese. There is holes -- that's the way that any of us are selfish, destructive, violent, malignant to those around us. And then there's cheese, those are ways that we may be caring of others. And that all of us are some mixture of those two things. Jonathan has some extraordinary damage to him. There is some extraordinary holes that allow this kind of offense to occur. There is also cheese. They talk

about him -- his family members talk about being stunned at his participation in this, that they regard him as sensitive, affectionate, the one who is likely to hug and be considerate and think about them. There are people that he has apparently volunteered to assist in the aftermath of the flood, that he was out mopping floors, that -- that along with these horrific holes, that there have been and are good things about Jonathan as well. That's a more complicated way to look at people. It's easier to think about them being either all malevolent or all really fine all the way through, but that's not how people are and that's not who Jonathan is. And so it's more complex, but more

* * *

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to go ahead and start with her tonight or quit at this time and come back in the morning?

MR. BRILEY: Go ahead.

THE COURT: Let's go on, then. We'll use these few minutes we have left. Mr. Greeno.

MR. GREENO: Thank you, Your Honor.

BARBARA HARDING,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. GREENO:

Q. Ma'am, could you please tell the jury your name?

A. I'm Barbara Harding.

Q. And Ms. Harding, you live in Dodge City; is that correct?

A. Yes.

Q. Are you related to Reginald Dexter Carr, Junior, and Jonathan Carr?

A. Yes.

Q. Can you tell the jury how that is?

A. I am their cousin.

Q. Ma'am, you need to sit up and lean forward a little bit.

A. I'm their cousin.

Q. Okay. Barbara -- or excuse me. Is Phyllis

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Harding your mother?

A. Yes, she is.

Q. Okay. Do you know Reginald and Jonathan's mother?

A. Yes.

Q. Janis?

A. Yeah.

Q. How long have you known Janis?

A. All of my life.

Q. Okay. And do you know their sister, Temica?

A. Yes, I do.

Q. Have you spent any time in Janis' house as a child?

A. Yes, I have.

Q. Did you have occasion to be disciplined by Janis?

A. Yeah.

Q. Did she ever use physical violence on you to discipline you?

A. She spanked me.

Q. Okay. How did she spank you? Can you describe that for us?

A. With a belt. I mean --

Q. Okay. More specifically, did you ever see Reginald or Jonathan Carr disciplined that-a-way?

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A. Not -- I mean, if we got in trouble, we got spanked. I mean, it's like -- how do you want to know? With what or how or --

Q. No. I just wanted to know if you had seen them be disciplined that-a-way?

A. If we got in trouble, we all got spanked at the same time, so it was just --

Q. Okay. And did that include Temica; is that correct?

A. No. Temica was a little bit older, so she -- I mean, I never really saw her get spanked.

Q. Could you scoot up, speak up a little bit?

A. I never saw Temica get spanked.

Q. Can you please tell us with some specifity, in some detail, how these spankings occurred?

A. Okay. We would just --

Q. What would she spank you with?

MS. FOULSTON: Your Honor, objection. No foundation -- time, date, place.

THE COURT: I'm going to overrule the objection. I take it that's where you are going, Mr. Greeno.

MR. GREENO: Yes, Your Honor.

Q. When these spankings occurred, where would you be at?

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A. Our grandmother's house. I mean, I was -- okay. When I was little, if we got in trouble, normally we would be at my grandmother's house. I do remember one occasion being at my aunt's house a long time ago. I never got in trouble there, but as a child, normally, me and my cousins would be in my grandmother's house.

Q. Okay. You would be at your grandmother's house, but would Jonathan and Reginald's mother discipline you there?

A. Whoever was there, yeah. Her or my grandmother or my uncle. Whoever was the adult.

Q. Okay.

A. Around at that time.

Q. Specifically, I want to talk about the instances with Janis.

A. Okay.

Q. Okay. When Janis would discipline you at your grandmother's house, how old were you?

A. There are so many times that I was there. I mean, like, when -- kids are kids. They get caught doing things, you know, they get spanked for it at that time. I mean --

Q. What is the earliest age you can remember Janis Harding spanking?

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A. Maybe five, four. I don't remember.

Q. What is the latest age you can remember her spanking?

A. Okay. I was, I think, 13.

Q. Okay. And would she -- did she use the same kind of punishment during that entire period of time?

A. No. I can tell you what it was for and why. I got spanked because my mother didn't want to do it because I was slacking off on my homework and she asked my aunt to do it, and I remember facing the wall and I got spanked with a belt.

Q. Were there ever any occasions when you were made to remove your clothes before you were spanked?

A. Yes. I remember having my pants pulled down and spanked.

Q. Okay. Were there ever any occasions when you were spanked where one of the -- either Reggie or Jonathan or Temica helped hold you down?

A. That was -- I mean, so our legs wouldn't move, so we wouldn't kick around, yeah. So we would stay still. We would get spanked like that.

Q. How frequently would these spankings occur?

A. Okay. I remember getting, like, doing

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mischievous things every day, so I don't remember if I got spanked every day, but, I mean, I know I got spanked quite a few times when I was a child.

Q. What kind of objects would you be spanked with?

MS. FOULSTON: Your Honor, excuse me. I object as to the foundation as to who is doing the spanking, because we've had a number of different peoples' names.

THE COURT: I'll sustain as to foundation.

Q. We're going to talk about spankings from Janis Harding; is that okay?

A. Uh-huh.

Q. Is that a yes?

A. Yes, sir.

Q. You need to speak out loud because she's taking down --

A. Okay. Sorry.

Q. You need to speak out loud, because she's taking down every word you say and we can only speak one at a time.

A. Okay.

Q. Spankings with Janis Harding. Did she use some sort of implement to spank you with?

A. I -- belts, spoons,

Q. Okay. Anything else that you can think of?

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A. Sometimes electrical cord.

Q. Did she ever leave marks?

A. Probably. I mean, I remember, like, trying to look at them, you know.

Q. Okay. Ms. Harding, did you ever have any physical altercations with Reginald -- Reginald Carr or Jonathan Carr when you were a child?

A. What do you mean?

MR. EVANS: Your Honor, I would object to any testimony elicited from her against Jonathan by Reginald.

THE COURT: I'll sustain the objection.

Q. Okay. Let's talk about Reginald. Did you have any physical problems, confrontations, fights with Reginald Carr?

A. Not really, no.

Q. Okay. Was there an occasion when you were living with your mother in California?

A. Yeah. There were a lot of things that went on in California.

Q. Okay. Well, let's talk about some of those. I know they are uncomfortable for you, but we're going to talk about them. You do recall living with your mother in California?

A. Yes, I do.

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Q. Was any of your other family there?

A. There was Uncle Michael and my cousin, Temica.

Q. Okay. Was your grandmother there for a period of time?

A. Yes, and she was also there.

Q. Okay. Did anything happen between you and your uncle Michael when you were in California?

A. Yeah. He -- he molested me when I was a little kid.

Q. Excuse me?

A. He molested me.

Q. Okay. Did you report that to your mother?

A. No, I did not, because he was my uncle and I -- I was a little kid. I didn't know -- I was -- I didn't know what it was, you know. I just -- no, I did not.

Q. That's okay. Did anything happen between you and Temica when you were there?

A. I remember sometimes we would play and --

Q. Would you like a glass of water?

A. No. Well --

MS. FOULSTON: Your Honor --

A. Okay.

MS. FOULSTON: I object to the relevancy of Temica Harding and any engagement between the

[p.150]

two of them.

THE COURT: I don't see the relevancy of it, but I take it you're working toward a point that will lead to it.

MR. GREENO: Yes, Your Honor.

THE COURT: Go right ahead.

Q. Can you tell us about that just briefly?

MS. FOULSTON: Objection. There's no foundation.

THE COURT: I'll overrule the objection.

A. Just that when we were little, we played, and what it all boiled down to was that I performed oral sex on my cousin when I was six years old. I didn't know what I was doing. I wish that it never happened. I can't stand the fact that it happened. I hate myself for it that it happened. Every day I have to think about what happened to me; okay?

Q. I understand. We'll move on.

A. All right.

Q. Is there a point in time when you were back in Cleveland for periods of time with Reginald and Jonathan and Temica when you were a child? Is that a yes?

A. Yeah. That -- we lived -- yeah.

Q. Okay. I'm going to ask you flat out, were

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there occasions when there was inappropriate sexual conduct between you and Reginald?

A. Yes, there was.

Q. And you and Jonathan?

A. With Jonathan, also.

MR. EVANS: Judge, object to that.

THE COURT: Same ruling.

Q. Okay. Let's just talk about Reginald, then; okay? At that point in time, were you having any problems with Temica?

A. No.

Q. Did you ever see any improper sexual conduct going on between Reginald and Temica?

A. No.

Q. Okay. When you -- how long did this go on with you and Reginald?

A. All the way up until Dodge City.

Q. And about how old were you at that point in time?

A. Twelve, 13.

Q. How old were you when it started?

A. Six or seven. I don't know. I was young when it started.

Q. Did you feel like you were doing anything inappropriate?

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A. Well, when you've been doing it all your life, you don't really think about what you're doing until you're old enough to realize that it's wrong. And, yeah, after -- I mean, I was used to doing that, so, I mean, it was just my life. So until I got old enough to realize and finally it stopped. That's when I started thinking about all, you know, that's --

Q. Did it stop at your request?

A. It didn't stop at my request. It just finally stopped.

THE COURT: Let me interrupt you right there, Mr. Greeno. It's time we'll quit, members of the jury. Be in your jury room about 8:20 in the morning, and we'll continue on with this part of the case. Thank you very much for your attention today.

(end of proceedings for the day.)

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STATE OF KANSAS)
) ss.
SEDGWICK COUNTY)

CERTIFICATE

I, Connie Uphaus, a Certified Shorthand Reporter for the State of Kansas, certify that I was present at and reported in machine shorthand the proceedings had in the case of State of Kansas v. Jonathan D. Carr, Case No. 00 CR 2979; and State of Kansas v. Reginald D. Carr, Junior, Case No. 00 CR 2978 before the Honorable Paul W. Clark, Judge of Division 9 of the District Court of Sedgwick County, Kansas, at Wichita, Kansas.

I further certify that the foregoing transcript of my shorthand notes is a true and accurate representation of all of the proceedings contained herein, to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, this _____ day of _____, 2002.

_____
Connie Uphaus, CSR

CONNIE UPHAUS, CSR

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 13, 2002]

THE STATE OF KANSAS,

Plaintiff,

vs.

REGINALD D. CARR, Jr.,

Defendant.

THE STATE OF KANSAS,

Plaintiff,

vs.

JONATHAN D. CARR,

Defendant.

VOLUME 46

TRANSCRIPT OF JURY TRIAL

November 13, 2002

APPEARANCES:

Ms. Nola Foulston, District Attorney, Ms. Kim Parker and Mr. Kevin O'Connor, Assistant District Attorneys, Sedgwick County Courthouse, 535 N. Main, Wichita, Kansas 67203.

Mr. E. Jay Greeno, Attorney at Law, 250 N. Water, Suite 215, Wichita, Kansas 67202, and Mr. John V. Wachtel, IV, Attorney at Law, Klenda, Mitchell, Austerman & Zuercher, 301 N. Main,

Connie Uphaus, C.S.R.

* * *

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Reporters' Certificate 199

* * *

[p.5] [*Cont. Direct Examination of Barbara Harding by Mr. Greeno*]

Q Good morning, Ms. Harding.

A Good morning.

Q We were visiting a little bit yesterday about some things that happened to you as a child; do you recall that?

A Yes, I do.

Q And I asked you some questions and some answers you gave us that weren't quite true; is that correct?

A Yes, sir.

Q When you were in California and the abuse occurred with your Uncle Michael, how old were you then?

A Six-years-old.

Q Did you report that abuse to your mother?

A When I was 15-years-old, I reported it to my mother and also at the time my grandmother was there. And they said that I was lying, so I kind of just, like, forget about it because I can't even get my mother and grandmother to believe me, so I just kind of like, whatever. I pushed it back inside of me and tried to forget about it again.

Q And during the time you were in California, some things happened with Temica; is that correct?

A Yeah.

Q Did Temica make you do those things?

A Yes, sir.

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Q And did that end with Temica when you were in California?

A Yes, it did.

Q And some other time, was there a period of time when you had sexual contact with Reginald Carr and Jonathan Carr?

A Yes, sir.

MR. EVANS: Judge, object to any evidence elicited against Jonathan by Reginald.

THE COURT: I will sustain the objection.

Q Let's just talk about Reginald right now; okay?

A Uh-huh.

Q Is that a yes?

A Yes.

Q Did you have sexual contact with Reginald Carr?

A Yes.

Q Approximately how old were you at that point in time?

A When, after California?

Q Yeah.

A Seven.

Q When you had contact -- this contact with Reginald Carr?

A Seven.

Q Could you tell what the nature of that sexual contact was?

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A Trying to make penetration but didn't work.

Q How frequently did that occur?

A Whenever we played some, like, maybe every day or whenever.

Q Do you know how old Reginald was when this happened?

A Maybe nine. He is two years older than me.

Q How long did this go on?

A In the day or night?

Q Did it go on for weeks or months or years?

A For awhile. For a few years.

Q And when did it finally quit?

A Well, with Reggie I was, I think, 13.

Q You were 13 when it quit?

A Because he was in high school and everything and, I guess, got beyond that, so --

Q How did it end?

A It just stopped.

Q It didn't stop at your request?

A I mean, it just didn't happen no more. I didn't say please stop. It just one day ended with Reggie.

Q This isn't something that's easy for you to talk about?

A No, it's not my favorite topic.

Q Has it affected your relationship with your family?

A Yeah.

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MR. GREENO: I don't believe I have any further questions. Thank you.

THE COURT: Mr. Evans, any questions of Ms. Harding?

MR. EVANS: I have none.

THE COURT: Ms. Foulston, have you cross-examination?

MS. FOULSTON: Yes, Your Honor. Thank you.

CROSS-EXAMINATION

BY MS. FOULSTON:

Q Good morning, Ms. Harding.

A Good morning.

Q Can you please tell me your date of birth?

A [REDACTED], 1980.

Q And that would be the same year that Jonathan Carr was born; is that correct?

A Yeah.

Q So both you and Jonathan were the same age?

A Yeah, we. are the same age.

Q And you said that your cousin Reginald, he was born in 1977 so he would be three years older than you?

A Three, yeah, something like that.

Q And Temica?

A I don't know her birth date.

Q But she is older than Reggie?

* * *

[p.58] [*Cont. Direct Examination of Norman Pay by Ms. Foulston*]

Q Raise your hand, Dr. Flynn.

(Doctor Flyrin complies.)

Q And you also have conferred with Dr. Bart Grelinger, who is a neurologist in our community. Dr. Grelinger, please raise your hand.

(Doctor Grelinger complies.)

Q So each of these documents was reviewed, looked at, and discussed with regard to the findings that were apparent; is that right?

A Yes.

Q Now Dr. Preston said there was a marked reduction in FDG uptake in the medial aspect of both the right and left temporal lobes. What can you say about that finding?

A That is not true. There is normal uptake and there is normal metabolic function of both temporal lobes.

Q As applied to which defendant?

A Jonathan.

Q Now look at Reginald Carr's and turn over and get the number on the back of it. This one. And that would be State's Exhibit No. 910. Jonathan's, you referred to as 913. When you look at 910, can you tell me if there was a marked reduction in the FDG uptake in the medial aspect of both right and left temporal lobes?

A No.

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Q He also says the temporal lobes are best seen in a temporal lobe orientation; is that correct?

A He doesn't have the temporal lobes in his scan.

Q Oh, that was my next question.

A Yeah.

Q Here is Exhibit A 39 and this is Reginald Carr's. You put it the right way because I can't do it. Which way?

A This way.

Q Okay, I am looking at it right. And then let's find Jonathan Carr's over here. So now we are going to look at JC No. 2 and A 39, and would that be the temporal lobe orientation?

A Yes. I would like to qualify because he zoned in on two structures, the uncus and amygdla. The uncus and amygdla are not in any of his cuts. They are part of the temporal lobes.

Q They are part of the temporal lobes. When you looked at these photographs, was there anything unusual about the coloration?

A Yes, it's a very odd coloration. We don't normally use this coloration to read our scans.

Q I am sorry, you use it for what?

A We don't usually use this coloration to read our scans.

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Q Did you find that the color had been requested by Dr. Preston to be taken to a 20-percent background reduction?

A We found out later.

Q Just yesterday?

A Yes.

Q And then that was in consultation with Ms. Stratton?

A Yes.

Q And, in fact, Ms. Stratton had been with Dr. Preston when he had her do these prints?

A Correct.

Q So is this like -- can you mess with colors?

A Oh, yes; oh, yes.

Q And what affect does that have on those exhibits?

A Well, you can channel some colors out and can channel some colors in.

Q Now if I was going to compare -- I think I asked Dr. Preston, gosh, this one over here, is this normal, or roughly normal we ended up calling it, looked so much different. What's different?

A It's a different color scheme.

Q So is this misleading in what you are trying to prove?

A Yes. Let me just elaborate a little bit on the color scheme. This is a spectrum.

Q You can show the jury.

* * *

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A The temporal lobe sits here in the back of the eyes, sits right here. Now in his scans -- well, we take our scans this way so that we see the temporal lobes, well, including the anterior temporal lobe. In one fashion or another he tilted it so much this way and that he took one cut like this, so that he missed the anterior portion of the temporal lobe, the uncus and

amygdla being the seat of the emotions is right here, and he completely missed it.

Q You came to learn that that was by design?

A We were told.

Q Now he says that now that we know -- let's go to the real ones, okay? I am going to ask you first to look at Jonathan Carr's information. Okay. Now, I am going to ask you if you can explain for us, if you will, the analysis interpretation based upon your expert vision, understanding and practice in neuroradiology and tell us about Jonathan Carr's brain?

A Looking at the scans, especially the coronal scan, there is normal metabolic function of both temporal lobes.

Q So what about this 40 to 50 percent decrease in uptake?

A There is no decrease.

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Q What about the decreases of up to 15 to 20 percent -- I am sorry -- Dr. Preston said the decreases up to 15 to 20 percent could be considered within normal limits but he said that this was decreased function; is that incorrect?

A That's incorrect.

Q Now he also says that the medial temporal lobes are regions that has the amygdla and hippocampus and that's what you talked about?

A That is true.

Q In his view, and he explained the hippocampus is the region for recent memory and is required for learning?

A That is true.

Q The amygdla is a region that is involved with assigning risk or danger?

A True.

Q And the decrease in the uptake of those functions does not work as intensely as it might be expected when you have these decreased uptakes of FDG 40 to 50 percent?

A But he didn't have the amygdla here, so I don't think he could make the supposition.

Q In fact, if you were to look at all those pictures and you have conferred with other radiologists and other experts and is there a conclusion as to the function of Jonathan Carr's brain?

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A You mean with his interpretation?

Q With this.

MR. EVANS: Objection to other folks' opinions beside Dr. Pay's, Your Honor.

THE COURT: I will overrule the objection.

Q You may answer.

A Could you repeat the question, please?

Q I guess I should, shouldn't I? When you reviewed this and as we talked about the number of individuals who called in to look, did you reach a consensus as to this brain being normal?

A Yes.

Q Do you have any quarrel?

A No.

Q Anybody have a problem with that?

A No.

Q Now looking at Reginald Carr's, if you would, Doctor. And again as I gave you this letter, again Dr. Preston says that there was a decrease -- a distinct decrease in FDG uptake of up to 40 to 50 percent and he showed this to be associated with decreased function. What can you tell us about Reginald Carr's brain from the documents you have here?

A There's normal metabolic function of both temporal lobes.

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Q And is this again a consensus opinion?

A Yes.

Q And you concur?

A Yes.

Q Now, Doctor, does there appear to be anything wrong with the brain?

A No.

Q I mean, does it looks like he got hit over the head with a BB?

A I can't attest to the BB, but it looks like a normal brain.

Q So there's no damage there?

A Yeah.

Q And you can't tell us from this how his mind works, can you?

A No.

Q You can't tell us how he makes choices?

A No.

Q You are just interpreting the science of medicine as to the condition of the brains of Jonathan and Reginald Carr?

A True.

Q Doctor, these two men we know are brothers.

A Yes.

Q What can you tell me about the brains of these two in

[p.68]

the scans that you are looking at?

A If I didn't know they were brothers, I couldn't tell.

Q And do these resemble each other?

A They do.

Q Knowing that they are brothers, does that explain it?

A No.

Q It doesn't?

A No.

Q So every brain is different?

A Uh-huh.

Q Is that a yes?

A Yes.

Q And the interpretation, when done correctly, shows the brain of Jonathan Carr is normal?

A Yes.

Q And that interpretation, when done correctly, shows that the brain of Reginald Carr is also normal?

A Yes.

MS. FOULSTON: State moves for the introduction into evidence of nine -- I am sorry -- I thought I heard somebody say something. Exhibits 901, Reginald Carr, and that's the sagittal?

A Sagittal.

Q View; 902, Reginald Carr?

* * *

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* * *

THE COURT: Hand these to her. I have the originals up here.

Are we are ready to talk about the Instructions to me? If so, how say you as to the forms of the verdict proposed and the

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Instructions proposed?

MS. PARKER: Your Honor, as to the verdict forms both as to defendants Reginald D. Carr, Jr. and Jonathan D. Carr, these issues have been discussed before. The State has no discussion to the verdict form. They are in compliance with the Supreme Court's definition in the Kleypas -- the first decision, the Kleypas Case -- the first decision to come out in the State of Kansas since the enactment of the death penalty law. Do you want me to proceed through the Instructions one at a time?

THE COURT: Only if you have something to say about each one of them.

MS. PARKER: The State has no objection to the Instructions in their entirety, 1 through 11 or 1 through, yes, 11.

THE COURT: There are 11, I believe.

MS. PARKER: Yes.

THE COURT: Mr. Greeno, are you ready to speak to those?

MR. GREENO: Yes, I am Your Honor.

As to Instruction No. 5, I would object to Instruction No. 5, specifically Paragraphs 2 and 3, as they are not supported by the evidence in

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this particular case. There is no evidence that indicates that these murders occurred for the purpose of receiving money or anything of monetary value. Nor is there any evidence that Reginald D. Carr, Jr. committed the crime in order to avoid or prevent a lawful arrest or prosecution. Nos. 1 and 4 are fact questions for the jury to decide but that would be my objection to Instruction No. 5.

The second page of Instruction No. 5 talks about what is especially heinous, atrocious, cruel. I know that's been previously approved. I don't like it and I am going to object to it.

I am going to object to Instruction No. 10, as I said previously, although it may not have been on the record. The language that's used in the first paragraph, although has met with the approval of the Court, I still feel that it is in the line of a mandatory death sentence or mandatory death penalty which I think the United States Supreme Court prohibits but I have knowledge that they reviewed this instruction and found it will pass muster.

I would object to Verdict Form No. 1 as to Reginald Dexter Carr for the reasons I stated in

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objecting to the previous section that talks about the aggravating circumstances.

THE COURT: That would be as you can see in each count.

MR. GREENO: As it pertains to Reginald Dexter Carr and as it pertains to each count of capital murder. I would also request the Court include pattern instruction for Kansas Third Criminal 52.13, which is defendant's failure to testify. I think it applies in this particular case as well or in this phase of the proceedings as well since Mr. Carr did not testify.

And I would ask also ask the Court Pattern Section under Kansas Third, No. 102.50, which is from the Civil Pattern Instructions of Kansas, but discusses expert witnesses. We had a lot of expert witnesses testify in this particular case. We had rebuttal expert witnesses testify. I have reviewed this Instruction and it seems to kind of pertain to what we have got going on here, how they are supposed to consider expert witnesses. I know that the Pattern Instructions for Kansas Criminal does not recommend an Instruction for expert witnesses, but I don't know why one would count for civil and not for criminal. So it

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would be my request to add that and I will have reduced it to writing and submit it to the Court for the record.

THE COURT: Thank you. Mr. Evans.

MR. EVANS: Judge, if I could take just a minute to read the expert witness thing, what he is proposing, to see if I want to join it.

I would join in requesting the expert witness instruction. I would not join in requesting the defendant's failure to testify instruction. I don't think that applies to this stage and I would object to it being given. We filed written requests several weeks ago and we gave you a copy.

THE COURT: Yes.

MR. EVANS: As they are different from the Instruction you are giving, we would note our objections and we would make them in that form as to the written jury instruction we gave you. We would join Reginald Carr's other objections to the Instructions and to the verdict form.

* * *

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please.

(After the jury had returned to their seats in the jury box, the following proceedings continued with both defendants present:)

THE COURT: Members of the jury, we are ready for the Instructions of the Law. Let me go over again the cell phone rule you already know. You will be given again the list of witnesses, the Exhibit List for the Plaintiff, State of Kansas, and the defendant Reginald Carr contained here, the one exhibit for Mr. Jonathan Carr is here. On the PowerPoint presentations that were presented during the guilt phase, what I will do, Mr. Presiding Juror, is leave those in the back. Anybody wants to look at them, we will bring out the computer and set it up. Set up in the courtroom so you all can use it, just like you did during the deliberations of your guilt phase. So pass us a note if you want to see the PowerPoints and we will set up a computer and you will be free to run those any way you want to run them.

Again, on your instructions on the sentencing phase. If I mispronounce a word or leave out a word, you are to go by the printed

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word. Don't be confused if I mispronounce or do anything to the word other than what's printed. That is your guide. That book is yours. Put your name on it, you can highlight, write in it or do anything you want to with it. Pick that book up, please, we are going to read them. I will read again. Don't get ahead of me. If you get behind me, indicate in some way you want me to slow up, and I will. As you know, our focus here is on the first four counts, those are the capital murder counts.

It is the responsibility of the jury to decide the proper sentence for the individual defendants in those four counts. We are not in that book yet if you are looking for where I am at, we are not there yet. It is my responsibility to decide on the proper sentence for the individual defendant on all other counts in which you returned a verdict of guilty.

Now to the book of the Jury Instructions Sentencing Phase. Go to the tab marked Instructions, please. That first page is again the cover page that tells you the name of the Court in which the case is filed, the parties to the lawsuit, and what the booklet is, Jury

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Instructions - Sentencing Phase. The next page lists the lawyers for the parties. And go to your next page. You should have Instruction No. 1.

Instruction No. 1. The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence. It is my duty to instruct you in the law that applies to this sentencing proceeding and it is your duty to consider and follow all of the instructions. You must decide the question of the sentence by applying these instructions to the facts as you find them.

Instruction No. 2. In your determination of sentence, you should consider and weigh everything

admitted into evidence during the guilt phase or the penalty phase of this trial that bears on either an aggravating or a mitigating circumstance. This includes testimony of witnesses, admissions or stipulations of

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parties and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

At times during the trial I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law to the evidence. If any statements or arguments or remarks are made that are not supported by evidence, they should be disregarded. If any statements are made regarding the law of the case that are not set out in these Instructions of Law, such statement should be disregarded.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

Instruction No. 3. You must give separate

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consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him. Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant.

Instruction No. 4. The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist. In making the determination whether aggravating circumstances exist that outweigh mitigating circumstances found to exist, you should keep in mind that your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

Instruction No. 5. Reginald D. Carr, Jr., Aggravating Circumstances. Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences, but which are above or beyond the elements of the crime itself. As pertains to the defendant Reginald D. Carr, Jr. the plaintiff, State of Kansas, contends that the following aggravating circumstances are shown from the

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evidence.

(1). That the defendant Reginald D. Carr, Jr. knowingly or purposely killed or created a great risk of death to more than one person; and/or

(2). That the defendant Reginald D. Carr, Jr., committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value; and/or

(3). That the defendant Reginald D. Carr, Jr. committed the crime in order to avoid or prevent a lawful arrest or prosecution; and/or

(4). That the defendant Reginald D. Carr, Jr. committed the crime in an especially heinous, atrocious or cruel manner.

(A) Heinous means extremely wicked or shockingly evil.

(B) Atrocious means outrageously wicked and vial.

(C) Cruel means pitiless or designed to inflict a high degree of pain; utter indifference to, or enjoyment of the suffering of others.

Instruction 5, Continued. A crime is committed in an especially heinous, atrocious or cruel manner where the perpetrator inflicts

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serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate.

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

Instruction No. 6. Reginald D. Carr, Jr., Mitigating Circumstances. Mitigating

circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame for which justify a sentence of less than death even though they do not justify or excuse the offense.

In this proceeding, you may consider sympathy for a defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the

[p.118]

State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

Our State Legislature has provided that mitigating circumstances include, but are not limited to, the following.

(1). The defendant has no significant history of prior criminal activity; and/or

(2). The crime committed -- the crime was committed while the defendant was under the

influence of extreme mental or emotional disturbance; and/or

(3). The defendant was an accomplice in the crime committed by another person. And the defendant's participation was relatively minor; and/or

Instruction No. 6, Continued,

(4). The defendant acted under extreme distress or under the substantial domination of another person; and/or

(5). A term of imprisonment is sufficient to defend and protect the people's safety from

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the defendant; and/or

(6). The age of the defendant at the time of the crime.

You may further consider as a mitigating circumstance any other factor which you find may serve as a basis for imposing a sentence of less than death. Each of you must consider every mitigating circumstance found to exist.

Instruction No. 7. Jonathan D. Carr, Aggravating Circumstances.

Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences, but which are above and beyond the elements of the crime itself.

As pertains to defendant Jonathan D. Carr, the Plaintiff, State of Kansas, contends that the following aggravating circumstances are shown from the elements.

(1). That the defendant Jonathan D. Carr knowingly or purposely killed or created a great risk of death to more than one person; and/or

(2). That the defendant Jonathan D. Carr committed a crime for the defendant's self or another for the purpose of receiving money or any

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other thing of monetary value; and/or

(3). That the defendant Jonathan D. Carr committed the crime in order to avoid or prevent a lawful arrest or prosecution; and/or

(4). That the defendant Jonathan D. Carr committed the crime in an especially heinous, atrocious or cruel manner.

(A). Heinous means extremely wicked or shockingly evil.

(B). Atrocious means outrageously wicked and vial.

(C). Cruel means pitiless or designed to inflict a high degree of pain; utter indifference to, or enjoyment of the suffering of others.

Instruction No. 7, Continued.

A crime is committed in an especially heinous, atrocious or cruel manner where the perpetrator

inflicts serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate. In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

Instruction No. 8, Jonathan D. Carr,

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Mitigating Circumstances. Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.

In this proceeding, you may consider sympathy for the defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. The mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

Our State Legislature has provided that mitigating circumstances include, but are not

[p.122]

limited to, the following.

(1). The defendant has no significant history of prior criminal activity; and/or

(2). The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; and/or

(3). The defendant was an accomplice in the crime committed by another person and the defendant's participation was relatively minor; and/or

Instruction No. 8, Continued.

(4). The defendant acted under extreme distress or under the substantial domination of another person; and/or

(5). A term of imprisonment is sufficient to defend and protect the people's safety from the defendant; and/or

(6). The age of the defendant at the time of the crime.

You may further consider as a mitigating circumstance any other factor which you find may serve as a basis for imposing a sentence of less than death. Each of you must consider every mitigating circumstance found to exist.

Instruction No. 9. At the conclusion of

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your deliberations, you shall sign the verdict form upon which you agree. You have been provided verdict forms which provide for three alternative verdicts in each of the four counts of capital murder. These are labeled as follows: Verdict Form (1), Verdict Form (2), Verdict Form (3).

Instruction No. 10. When considering an individual defendant, if you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the particular defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances which you unanimously find beyond a reasonable doubt. That is Verdict Form (1).

Now, just pick up that tab Verdict Reginald D. Carr, Jr., and the first page is the verdict and the second lists the lawyers. Then see Verdict Form (1). Everybody have that?

Count 1, Capital Murder, Heather Muller. We, the jury, being duly sworn upon our oath make the following findings concerning the sentence

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for the defendant Reginald D. Carr, Jr. As to Count 1, capital murder of Heather Muller. We find unanimously beyond a reasonable doubt that the following aggravating circumstances have been

shown to exist. Please indicate by X in the blank space.

(1). That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

(2). That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(3). That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(4). That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

As to Count 1, capital murder of Heather Muller, we find the proper sentence for Reginald

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D. Carr, Jr. is death. Then signature line for your presiding juror and the date.

Now, turn back to verdict -- or the Instruction No. 10, the second paragraph. If you find that the evidence does not prove any of the claimed aggravating circumstances beyond a reasonable doubt, your presiding juror should mark the appropriate verdict form. That is Verdict Form (2).

The Court will fix a proper sentence for the particular defendant. Turn back then to Verdict Form (2) under that tab.

Count 1, capital murder of Heather Muller on Verdict Form (2). As to Count 1 Capital Murder of Heather Muller, we the jury being duly sworn upon our oath, find that the aggravating circumstances claimed by the plaintiff, State of Kansas, have not been proved to exist beyond a reasonable doubt. And a line for your date, signature line for your presiding juror.

Back to Instruction No. 10, please, The third paragraph. If one or more juror is not persuaded beyond a reasonable doubt that aggravating circumstances exist or that those found to exist do not outweigh mitigating circumstances, then you should sign the

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appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death. That is Verdict Form (3). In that event, the Court will fix the proper sentence for the particular defendant.

Turn back to Verdict Form (3). Verdict Form (3) under the tab, Verdict Reginald D. Carr, Jr., Count 1, capital murder, Heather Muller.

As to Count 1, capital murder of Heather Muller, we the jury being duly sworn, upon our oath, state that we are unable to reach a unanimous verdict sentencing the defendant Reginald D. Carr, Jr., to death. Please indicate by X in the blank space

(A) we are not able to agree unanimously that the evidence proves an aggravating circumstance exists.

(B) We are not able to agree that the aggravating circumstances that were proved to exist outweighs the mitigating circumstance shown to exist by the evidence. Then again a date line for your verdict and a signature line for your presiding juror.

Back to Instruction No. 10, please. Be on

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the fourth paragraph that starts as concerns the counts; everybody have that? As concerns the counts other than the first four capital murder, the law gives the Court the responsibility to fix a proper sentence for each defendant.

Should the responsibility to fix a proper sentence in all counts -- to include the first four, capital murder, fall to me, you are instructed that the total sentence would be such that the individual defendant would not be eligible to appear before the parole board for a certain period of time. The period would be a minimum of 50 years and a maximum of 268 years. It is for the Court to decide.

Now in each count there will be a Verdict Form 1, 2, and 3, and I think everybody understands that.

Instruction 11. Your presiding juror will continue to reside over your deliberations in this proceeding. That person will speak for the jury in Court and will sign the verdict upon which you

agree. Your verdict must be founded entirely upon the evidence presented and the law as given to you in these instructions. Your agreement upon a verdict sentencing a defendant

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to death must be unanimous. And write in, if you would please, today's date which is November 13, 2002. The original of your verdict forms will be in these covers. There's one for Reginald D. Carr, Jr., and one for Jonathan D. Carr. You will have those with you.

The next part, members of the jury, is closing arguments. You will recall the purpose of closing argument is to give the lawyers for the parties an opportunity to suggest to you, the jury, what your findings ought to be in this case.

Mrs. Foulston, you will make first.

MS. FOULSTON: Thank you, Your Honor.

THE COURT: Ms. Nola Foulston for the plaintiff, State of Kansas.

MS. FOULSTON: May it please the Court, counsel, ladies and gentlemen of the jury. There has not been a stone that's been left unturned. There has not been a piece of evidence that at one time or another that you have not looked at. There has not been any lack of information presented nor has there been any suggestion of lack of interest on the part of this jury. You completed the first phase, the guilt phase, with

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the determination as to the culpability of the individual defendants, Jonathan Carr and Reginald Carr. That determination has been made.

And we pass, then, to the sentencing phase, that which we are talking about here. where there is a chance for the defendants to present information to you as a jury in some way to respond to the question of whether or not the death penalty is appropriate, to mitigate, to lessen, to look at them in a different light. And I believe that the evidence has been quite a bit of evidence that has been presented by the defendants. We have had a lot of laundry, dirty and clean, in this courtroom. We have had a lot of information that you as jurors have the ability to sort through and make some determinations. We have had medical testimony, psychological testimony, neighbor testimony. And I want to talk to you about this phase and what its meaning is.

When we talked to each and every one of you jurors at the very beginning of this process, we were very clear to point to you and say it is the burden that is placed upon the State of Kansas to prove what we say happened. And, again, the

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burden is on the State to prove that the aggravating factors must outweigh the mitigators in order for the death penalty to be imposed. And that is not something that, the obligation, that you have taken lightly in the first phase nor is it expected that you would do anything but to research and to analyze and to distribute the information and to weigh it

and measure it and turn it upside down and look at it backwards, and to have a healthy discussion about the relative merits of that which you have heard in the courtroom. The State has many, many days of evidence that went towards the proof of the aggravating factors in this case.

If you recall at the conclusion of the case after the jury's verdict came out, what our position was, was to adopt all of those days of testimony, everything you heard in that Court, and give it to you in this phase saying that the body of the crime, that information should be and can be reconsidered in these aggravating factors, as they would apply to the capital death of Jason Befort and Aaron Sander, Brad Heyka, and Heather Muller. The State has given you those aggravating factors that by law has been set down

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and applied to this particular case.

So let's look at them in Instruction No. 5. When we talk about aggravating, we use the term very much in our daily lives. Turn the TV off, it is aggravating me, heightening your awareness. Don't do that, it aggravates me. Don't pick at it, it will aggravate the wound. In a legal sense, the Court explained that aggravating circumstances are those that increase the guilt or the enormity of the crime or add to its injurious consequences but which are above and beyond the crime itself. And you know that the crime of capital murder has been found.

Now you look at the circumstances that would enhance those crimes from the perspective of a

rationale, thinking jury to say, you know, these aggravators make that crime even worse. And that is what an aggravator is. So we point specifically, we point to each defendant, two defendants, two brothers, two culprits, two criminals, two individuals all found to be culpable of capital murders of four people.

We say what is it that enhances the nature of the crime? The first one that the law states is that they knowingly or purposefully killed or

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created a great risk of death to more than one person. We know from all of the facts and all of the information that these were five killings that were experienced. Only one survivor but five killings, and throughout the course of the terror of that night of December 14th into the early morning hours of the 15th, the terror and risks of harm was always there. Yes, there was a risk of harm to all of them, everyone in that field, but the capital murder of only four.

The State has also alleged, and the wealth of evidence cannot be undercut by any means, that these crimes were committed by Reginald and Jonathan Carr for the purpose of self, for the purpose of obtaining things of value, a television set, money, ring, golf clubs, clothing. All the items you see in this courtroom. All of these things for the purpose of self. This smacks of greed. It smacks of self purpose. It almost hits you over the head with what these individuals were thinking and doing in enhancing their crime by collecting these things

that mean nothing. Mean nothing today. But to them it meant everything. And it meant the killing of four people to get these

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material benefits.

And, you know, if you imagine and you ask yourself a question, and I don't know the answer, why did they have to kill them? Well, why didn't they just kind of tape them up or lock them in the house or why didn't they just kind of drive them out to that field like they said they were going to do, just drop them off naked, and be able to go back to the house and clean it out and then leave. Because there was a plan to leave no witnesses behind. To leave no traces in the snow except for blood. To leave no footsteps. To leave no fingerprints by using Windex. To leave no evidence of their being there by using gloves, dimming the lights, not wanting to be seen. Because if they were seen, these individuals had the ability to let law enforcement officers know what had happened.

And it was not in Jonathan and Reginald Carr's best interest to leave individuals alive to tell the story that might cause them to have responsibility for the already heinous and atrocious acts that they had committed before the killings. There were 23 sexual assaults. There were kidnaps, humiliation, beaten with golf

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clubs. And, you know, ladies and gentlemen, we made the conscious decision not to show you again

the photo of the scene of the events at 29th and Greenwich because it's etched there. Individuals there are frozen in time. They are not mannequins in that snow. Those are people, living, human, breathing individuals. And that crime made their lives end in the most gruesome and vial way. It made their lives end after degrading them to the extent that no human being should suffer what they suffered or have been humiliated as they were humiliated.

I think that you need to consider that at 29th and Greenwich Road we are concerned with the death of those four young people. I don't like to call them victims. It's not personal. Those are people. It was Jason. It was Heather. And, oh yeah, it was Brad, and it was Aaron. And that's how their family knew them. They didn't grow up with a target on their head saying victim. They weren't buried with a tombstone that said victim. But those individuals were in a position where they were being punished.

And the question is what mitigates punishment? Something for the jury to decide.

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What is it that should lessen or alleviate or diminish or decrease the responsibility of Jonathan and Reginald Carr for the punishment that fits this crime that's set forth by the laws of the State of Kansas. This isn't something that was made up yesterday. This is the law. And when you think about mitigation, think about mitigation of the execution of Heather and Aaron and Brad and Jason. Think about no PowerPoints in that field.

There were no psychologists debating the issues. There weren't any brain scans that were done before they were executed. Judge Clark wasn't there. No prosecutors. No defense. There wasn't any witness chair that was set up in the snow where family members of Brad and Jason, and Aaron and Heather could come and say, Show mercy to my child. She has led a good and exemplary life. There was no person from the Befort family to say, Please, spare this punishment, show mercy. There wasn't any witness called for Aaron Sander. There wasn't any witness called for Brad or Aaron or Heather. There was no consideration of mitigation for the execution, their punishment that occurred on that field. And there wasn't any play-by-play

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analysis. And the only reason that we know what we know today is because there was one survivor, certainly not by plan or design of Reginald Carr or Jonathan Carr.

When you look back at one's life as you grow older, you think of the joys of youth and your childhood and some of you may have recollections of not so great days. You may have recollections of walking with your parents in the park like Janis Harding, like Barbara Harding and her mother Phyllis. You might have also some bad memories of your parents. You might blame your parents for all the bad things that happen to you today. I think Mr. Evans said it best that Janis Harding is not June Cleaver. And these defendants are not the Cleaver boys.

How do we know that? You know, I want to show you a photograph and it's a cute photograph. It's a cute photograph of Jonathan and Reginald, Exhibit A 8. And it shows two young boys with smiles on their faces, healthy-looking, happy, well-clothed and enjoying the photo session. These kids are gone. They don't exist anymore. These children have grown up to adults that didn't just lose their moral compass, ladies and

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gentlemen, they threw it away. They pitched it. These are individuals who lead and led their lives with the reckless disregard for the rights of others. Who committed crimes that were heinous and atrocious and cruel and vial, and there aren't enough words to describe what they did to Jason and Aaron and Heather and Brad. There just aren't enough words. There's pictures and there's memories but there are not enough words to describe how vial and despicable what these two individuals did to those young people in that field.

Human beings are responsible for their acts. You know that is really, truly what separates us from primates. The ability to reason, the ability to think. The power of free will. The power of choice. To choose what you want to do. To make those decisions and to act upon them. And these individuals, too, were endowed with reason. These two, Jonathan and Reginald, by various descriptions were endowed with intelligence. These two individuals came from a family where some of their members of the family all from major lineal

line, all sharing DNA, all from the scientific issues, these two

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individuals came from a family where some people worked for a living. Like their Mom. And it's a tragedy, a tragedy that she tried to make them responsible by making them eat vegetables. That's a tragedy. So we have to hear about this today, to mitigate the punishment in this case. That the death penalty should not be imposed, Ladies and Gentlemen of the jury, the defendants had to eat broccoli. It doesn't work. These defendants had free choice and free will.

And I will tell you what, they had more than that. They have normal brains. Ah, the normal brain, the PET scan. If you remember Dr. Preston came in and said, Oh, there's some problems here. We got problems in River City and it is problems with the brains of these young people because looky here, that A 40, this is a normal brain. Ladies and gentlemen, hold it the right way. And would you look at this? This is the brain of Jonathan Carr. Can you see the difference there? Oh, and this one, this is the brain of Reginald Carr. Can you see the difference? Can you see where the center of their brain has been destroyed or 40 percent decreased? Can you see that?

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Yeah, these colored picture are pretty slick. They are. They are really slick. Better than those old X-ray kinds of things, you know, just black and white. But, you know, it all depends on who is looking and

it all depends on what they are doing with these documents, these digital pictures. There's no doubt these two guys had PET scans. And they presented them to you as abnormal. The foundation of their lack of culpability. We are not responsible or we should be given mercy and sympathy because, golly gee whillikers, look at the miserable childhood that we had. And look at our brain because our brains support that I got hit with a BB, or I got hit with the trash can and it may still be there, oh, look at it.

But when the truth comes out and the doctors come and say well, you know, these aren't right. In fact the statement was it was wrong to show you these. Because these show nothing. The hocus pocus of all of this was not right. It was manipulated. The color background. The slice of where it came from. The coloration from one to the other. You know Dr. Preston said, Yeah, that's a different

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machine. There was nowhere in there when I actually sliced it in a different angle so you wouldn't see all the pretty colors you see here because then they would look like they were okay and that one was okay. He didn't say that. But the doctors who practice and concur, radiologists, neuroradiologist, technician and PET scan chief for MR Imaging where they were taken, they weren't allowed to look at them back then. Looked at them yesterday. It's wrong. What is your colleagues' conclusion? These are normal brains.

So what does that do? What does that do to the foundation of this sympathy and abuse excuse and

blame? Where does that put that? It puts the foundation as if the foundation had totally disappeared and the house comes crashing down. Because there is no abnormal brain. It is a normal one. And you can't link -- you can't link all the rest of these things to this, how tortured and how terrible it is. And, Ladies and Gentlemen of the Jury, when you are disabled, you want to think of yourself as capable, not disabled. When you think of yourself as someone who is truly, truly emotionally disturbed, they

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don't want sympathy. They want to be understood for what they are trying to do. Whether it was Michael Harding who seemed to be emotionally disturbed, truly lacking the faculty to make life work for him. And it is shameful to try and throw yourself in a category of individuals who are emotionally disturbed and in some way less because of this sham. And to rely on this to say excuse me, please, I have an abnormal brain and therefore, I had a lousy childhood.

And when you put that all together, that information should lead you to give me mercy because, you knpw, we deserve it. Disabled people do not want sympathy. They just want to be appreciated .for their abilities. And I certainly ask you to reflect on the abilities of these two gentlemen here. These two individuals, their acts. These were kids who drug their laundry here in Court. Put their mother on the witness stand, criticized her. Gave her despicable commentary. Got into her private possessions. Talked about seeing naked

pictures of her. Maybe they weren't meant for Reginald Carr's eyes. But you can't continue to blame your parents for things that go wrong in your

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life. Around the population of the United States, people get divorced every single day. We try very hard to feed our kids vegetables because they are good for them. I am sure a lot of kids are holding their nose and eating broccoli but they don't turn out to be individuals who commit capital murder. Children are disciplined. All right, some people might not agree with every form of discipline. In fact, you heard Dr. Phyllis Harding say, You know, at my age when I grew up, there was a certain discipline that was accepted and they carry forward that kind of discipline because that's what their parents did.

These defendants share a lot of things in common. They have somewhat of a common family history, although they were separated at times. Separated for a good period of time when Reginald Carr was in prison. They have the same eye color. They are now both wearing glasses, although their mother said that Reginald doesn't need them. They share some DNA. They share intelligence. They also share immediate self gratification. That they want something and they want it now. And they also share choices. In our lives the choices that we make are important

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but what's even more important is the ability to take responsibility for those acts. To be a stand-up

kind of person and excuse yourself if something was said wrong. It wasn't correct.

People, we hope, use a moral compass to serve as a guide in their lives. But in this case, it wasn't the system that failed and it wasn't Janis Harding that failed. It was the defendants who failed to abide by the law and it was by their choice. We hear all the time the comment that says guns don't kill people. People kill people. That's right. And in this case they chose the Lorcin .380 as the messenger and their message was loud and clear. Their message was unmistakable. Their message was grievous and heinous and atrocious and vial and other words that cannot be described. Their choices were to leave no tracks, to leave no trace, and certainly not to leave anyone alive who would pass on the account of these evil and horrible events.

But the events were passed on by a survivor, and you will reflect even to the testimony of Tronda Adams, who was watching TV, saw Reginald Carr being arrested, and tried to get Jonathan Carr to talk to her, to admit

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something because it was all too coincidental, the FUBU shirt, the cars, everything else that was going on. She baited him a little bit. She said, You know, they found four people dead. Well, that must have woken him up. Four, there were five. Maybe I counted wrong. Five, it had to be five. Well, yeah, too bad, what a tragedy. Yeah, and they took them to ATMs. How did they know that? They knew it

because there was a survivor but it wasn't planned that way.

Covering the tracks of your crime in this instance is an aggravating circumstance that you may consider. That you may consider that these defendants committed the crime in order to avoid or prevent a lawful arrest or prosecution. It clearly -- it's very clearly true. They did it in the worst way. They just didn't tie them up or leave them naked in the field in the cold to run home. Kind of take a couple of hours to get their frozen -- to get home. Left them frozen in time. And when you are going to do something like that so nobody detects your crime, you have a lot of options. You lock them in the closets, put a gag on them, pull the telephone wires out. You could tape them all up. You could flatten

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their tires. Pull out the phones. You could cut the wires. You could put a do-not-disturb sign on the door. That didn't happen.

THE COURT: One minute.

MS. FOULSTON: It didn't happen because it wasn't the choice of Jonathan Carr and Reginald Carr. And, ladies and gentlemen, as they sit there, the Court has told you you can consider sympathy and you can consider mercy for these two defendants. That's in here. And, Ladies and Gentlemen of the Jury, as District Attorney of this jurisdiction, I seek the death penalty. And, ladies and gentlemen of this jury, I ask you to show Jonathan and Reginald Carr the same mercy that

they showed to Jason Befort, and Heather Muller, and Brad Heyka, and Aaron Sander. No mercy. Thank you.

THE COURT: Thank you.

Mr. Greeno. Jay Greeno for the defendant Reginald D. Carr, Jr.

MR. GREENO: May it please the Court, Mr. Carr, Mr. Carr, counsel, Ladies and Gentlemen of the Jury. Twenty-five years ago tomorrow, there was a little boy that was born in Cleveland, Ohio. He was two months' premature. He was

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jaundiced. He had a low- birth rate. He spent the first three to four months of his life in a hospital recovering from that birthing experience. And then he was delivered up to two young parents; Janis, 18, Reginald, Sr., 19, who had previously given birth to another child two years earlier, Temica, when Janis was just 16 and Reginald was just 17. They had to leave Temica with Reginald's mother for the first year of the life because their parents didn't approve of the relationship and marriage and they ran off and they hid. They came back and they took Temica and ran off again and they got married when -- just a few days after Janis turned 18, sometime around the time that Reggie was born.

You know, it occurred to me, and I heard this out of a movie actually, you know, you have to have a license to be a nurse. You have to have a license to be a contractor. You have to have a license to practice law but anybody can have a child. That

requires no training. There's no active supervision to make sure you are doing it right. You are left upon your own devices to be responsible for the molding of a human being. The human being that started out early in his

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life like this young man right here. That's Reginald Carr, Jr. When he was little, his family was intact and before all the abuse started in his family. And ended up on December of the year 2000 like a guy like this, committing the horrible acts that you guys have heard all about. Nobody's denied it. That is the most atrocious tragedy you can imagine. It begs the question, how does another human being do that to another human being?

In this phase, we have attempted to try to explain how you get from this point to this point. We are not saying that Reggie is not responsible. We are not saying that Reggie shouldn't be punished for what he has done. What we are saying is that Reggie deserves the understanding of 12 citizens who is going to decide his fate in determining whether or not the choices that somebody else made for him, before he was born and during his childhood, whether those choices affected his ability or his ability to make good choices later on.

Reggie should be locked up. He should be locked up forever. And the Court gave you an instruction that says if you save his life, at a

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very minimum, he will be locked up in a cage for 50 years. I have not been 50 years on this earth. Fifty years before he will ever see a parole board. A parole board who has probably not even been born yet. And he is looking at the possibility of 268 years. In all likelihood, if you spare Reginald Carr's life, he will die in the penitentiary.

Mrs. Foulston got up here and talked about the PET scan thing. Well, you know, we didn't hear about Dr. Woltersdorf. And if you will recall Dr. Woltersdorf's testimony is that he conducted these neuropsychological tests. He wanted to find out what was wrong with Reginald Carr's brain and he did those neuropsychological tests over a year before Dr. Preston got involved in this. Dr. Woltersdorf did not release the results of his testing, did not tell anybody about the results of his testing because he didn't want anybody who has a possibility of manipulating the subsequent tests to conform their tests with his results. And you know what, he didn't do that. And you know when Dr. Preston read those PET scans, if you recall Dr. Woltersdorf's testimony, it was confirmed that

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the PET scan that Dr. Preston analyzed confirmed what Dr. Woltersdorf said. You got to think, you know, use your common sense here. You know, we got a guy, you think this old man would come in here and lie to you about this? A doctor, a professor emeritus, at the University of Kansas School of Medicine in Kansas City. Forty years he has had a

distinguished career. This guy is going to come down to Wichita, Kansas, manipulate the data and come in here and lie to you guys for somebody he doesn't even know. And just so happens when he is lying to you, his results conform with what Dr. Woltersdorf told you. And Dr. Pay told you Dr. Woltersdorf is very competent, he works with him all the time. You know, we didn't come in here making excuses for this guy. We came in here to show you what it was like to be Reginald Carr when he grew up and how he got to be the way he is.

Dr. Reidy, I thought, did an excellent job going through this one by one, bringing in the studies from the United States Department of Justice. You know, we find these factors in people that have caused violent crimes that do violent crimes. This is a violent crime, no

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getting around it. These are the factors we see. And we are looking to determine whether or not some of these factors exist in Reginald Carr's life and they almost all do. And, you know, Reggie didn't come in here and blame it on his mother. You know, he wasn't very happy about this. He excused himself from the courtroom on more than one occasion. That was us because we went out and we did the investigation and we asked the questions. Dr. Reidy asked the questions. He compared the results that he got from answers he got from other people. He told you, he says, I don't have any confirmation on that. I don't have any confirmation. It is all for you to consider to determine whether or not you want to give that any weight. But when you look at the

nature of this crime, look at that. That in and of itself speaks volumes. This crime had to be committed by a damaged individual or individuals as the case may be. We just don't grow up that way without some sort of intermingle factor, some sort of damaging factors that Dr. Reidy talked about.

I am going to spend a little bit of time talking about those things to kind of remind you

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what we heard in this particular case. Right after Reggie was born, 14 months almost to the day, he had a little sister that was born, Regina. At the age of two, Regina was diagnosed with leukemia. At the age of three, she was dead. Reggie was four-years-old. You can only imagine what that loss had to mean to Reggie. How do you comprehend that? How does a four-year-old comprehend the fact that his three-year-old sister is never, never coming back home. You know, I think it's evident in the fact that Reggie chose to name the only daughter that he has Regina, regardless of the death of his sister and the problems that started with the marriage.

The problems -- a lot of people see this stuff. You have to consider the specifics of these problems, alcohol and drug abuse going on with the parents. We got domestic violence and we are talking about seeing your father chase your mother down the street with a brick. You know, having your mother beat your father up with a baseball bat. We are not talking about a shove or a push or a slap here. We are talking about large amounts of violence involved in these kids'

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age early, early, early on. I mean,, way early. Allegations of infidelity coming from both parties, and they were probably true. Mom told you that she thought that the children were unaware of these problems but later learned they were painfully aware of this.

Temica called this family before the Brady Bunch and then afterwards it was horrible. They all saw the family crumbling down around their ears. Mom excused herself from their homes. I wasn't abandoning home but I was leaving abuse. She was leaving the children with a guy that was abusing alcohol, that was abusing her, and engaging in sexual infidelities. I mean, you just don't do that.

Then all of a sudden, out of the blue, Janis shows up, snatches these kids up, takes the kids out of the home. All this time, the kids don't have any explanation what's going on here. Mom and Dad never sat down and said, We are having problems with you and we are going to try a trial separation and you need to understand what is going on. They tried to keep this all a secret and from then on, everything is moot. She snatches the kids up and takes them over to her

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mother's house. We aren't talking about emotional disturbances here. We are talking about somebody who is mentally ill. You know, Dr. Harding was kind of reluctant to talk about it because she wasn't actually sure of what the actual diagnosis was of her mother's illness that she has known and seen

all of her life, basically. A medical doctor that can't tell you that the diagnosis of her mentally-ill brother. That may not be as reflective upon Dr. Harding as is on her whole family and how dysfunctional this family was even back then, all the way before Janis and Phyllis.

In the meantime, Janis continues to drink and distances herself from the children. You know, in fairness to Janis, she's got some problems going on here. She's a very young mother, got a boatload of kids to take care of. She has lost a daughter. Her husband is out being unfaithful. She hasn't worked. She has got a mother that's mentally ill. What's she going to do? And so Janis deals with her problems the way Janis can deal with her problems. She drinks. She emotionally detaches herself from the children because she, quite

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frankly, doesn't have a lot left. This marriage has taken its toll on her. These children are experiencing the only caregiver they have, that can form those attachments, that Dr. Reidy talked about, pulling away from them, separating herself from them, leaving the house, taking them to relatives.

She takes up with Rick Austin, further engaging in this separation from her children. Rick and her going into the bedroom. Her fixing the meals, leaving them on the stove for the kids to eat. You know, and this whole vegetable thing. You know, we are not talking about, You are in trouble, you are on punishment, so I am going to make you eat

vegetables. We are talking about a woman, you know, I have had it with you guys. You ate all the good food in the house so I am not buying anything until you clean all the rest of the stuff out. They are made to eat canned vegetables over and over again until they are all gone. That's not caring. That's saying I don't care about you guys anymore. You eat what's there until it's all gone and I will go buy some more. Is this what a mother does? You know, and it is kind of funny when you look at

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it. Ms. Harding goes, Well, and I am talking about Janis. Yeah, I did spend quite a bit of time in my room but, you know, the kids all had their rooms. They weren't allowed in the living room. They couldn't come in there and watch TV in the living room. We never had a place where we all gathered together to spend any family time. No bonding or anything like that but, you know, the kids all had TV and VCRs and videotapes. Those items there certainly entertain you and nurture you as a child. That will teach you how to make bonds with other human beings. That will teach you empathy for somebody else's suffering. It doesn't. We all know that and that's what she did.

That's kind of interesting, the funds to buy all these things but when she had to ship Temica out to California for two years and when she had to ship Jonathan down to Texas for two years, we didn't have the money to go see them. We couldn't make any phone calls. We couldn't write any letters to my kids. We couldn't do anything. Reggie is staying in the house where his mother is more attached. When

the kids were going off somewhere else. His brothers and

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sisters, the only other people he can rely upon.

You know, stability kind of disappeared in this guy's life. Eight schools in eight years. Can't make any friends, can't have anybody come over and spend the night, doesn't know anybody. Moves from residence to residence from first his mentally-ill grandmother. Bill and Cortez Jones, Janis' Godparents, I think she said they lived with them for about a year. And several residences in the suburbs of Cleveland and finally that move to Dodge City, you know, where they don't know anybody. That's got to be a completely different environment than it is in Cleveland, Ohio, where the neighborhood they grew up in is predominately black. They feel comfortable. Dodge City, there is not very colored folks over there.

What was it like for a kid going into the environment and without the tools to socialize and adapt? Okay. So Reggie started getting in trouble. Everybody, well, you know, he really didn't get in trouble. Yeah, he got in trouble. This guy had numerous absences in the 8th grade. Got kicked out for sexually harassing the teacher. That's kind of unusual behavior for an

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eighth grader. By the time Reggie got to -- well, long before the time he got to Dodge City, Reggie had already received the gift of an antisocial personality

disorder. That was described by Dr. Woltersdorf, which basically facilitated his entry into a criminal lifestyle. When he was in Cleveland when he was 11 years old, he was holding drugs for drug dealers. He was dealing drugs at age 13. He was involved with a cousin, Eric, Jr., who dies a violent death after they move to Dodge City, Kansas; he gets shot in the head.

Engaging in very, very inappropriate sexual conduct. You will recall the reports of Reggie touching the girls his mother was babysitting, having sex, and incredibly, upstairs with a girl, Amber, who lived upstairs. And Barbara Harding, bless her soul, coming in here to tell you about this. That was the most painful thing I saw from Reggie's family. She didn't want to talk about that. It wasn't pleasant for her. But you needed to know that because something happened to these kids. Something happened to them that damaged them to cause them to act this way.

This is what these doctors were here to

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tell you about. That's why Dr. Reidy was here to tell you about this. That's why Dr. Woltersdorf was here to tell about that. That's why Dr. Preston came down here and did that PET scan. But if you choose not to believe Dr. Preston and you want to believe Dr. Pay, who doesn't read PET scans normally, it doesn't matter. Dr Pay says, your know, we do confirmatory tests all the time. Sometimes they do, sometimes they don't. That's all the PET scan was, was to confirm what Dr. Woltersdorf had found

during the course of his neuropsychological examination. Dr. Preston confirmed it but they choose to call him a liar.

MS. FOULSTON: Objection, Your Honor, to the characterization of what I choose to call someone.

THE COURT: Overruled. Press on.

MR. GREENO: Thank you, Your Honor. You have the right to use common sense in evaluating this evidence.

All this time, you know, Reggie's kids are being shipped off. Mom is not having anything to do with them. Reginald, Sr., who was obviously an important part in Reggie Jr.'s life just all of a sudden gets up and leaves him alone. He

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just doesn't go there. And then, you know, he is supposed to go see his father. Go out there and spend some time with his dad. He has been, you know, with his relatives in West Virginia. You know, just another place for him to go. And then at the last minute his dad calls and says, Don't come.

Now, State of Kansas as well, Detective Craig, talked to him. He said, We had an earthquake hit and his home was damaged. Well, you know, California doesn't have earthquakes every day. They don't have -- it would be hard to believe that Reginald Carr, Sr., could never find the time or means to spend time with his son, a son that he named after himself. He left. He had another family, who he later abandoned, left those alone in

Las Vegas. You heard that from several doctors in this particular case.

The whippings, the beatings that were imposed upon the children and you got to think about this. You know, not just your general belt whipping. We got a mother who names these different belts, Hot Rod and Heat Daddy. Think about the way the stuff is inflicted. You know, the children when they knew they were going to be

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beaten with the belt were required to pick the tool that was going to be used on them. Many times being forced to strip naked and laid down and be held by their siblings while their mother inflicted this punishment, sometimes to the point where she is so tired to go on she had to rest and she came back and do it again. Temica Harding told you she beat her with an electrical cord and she still has the scars.

We are not making excuses here. We are telling how these kids' lives were shaped and how they came to make the decisions that resulted in this horrible crime. The accident Reggie had when he was in West Virginia, on the bicycle, hit his head, had loss of memory, indicative of brain injury. All the fights he had that was too numerous to mention. Those are all important factors in the development of Reggie's brain. And if you believe what the doctors tell us, a brain even today is not completely formed. You know, the domestic violence over and over again, either witnessing of the violence between two people that are supposed to be

loving each other and the violence that's perpetrated on these kids by the people that are supposed to love them. They see

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their stepfather whom they really haven't developed very much of a paternal or parental type contact with holding a gun to their mother's head. Drug and alcohol use. Mom and dad both drank every day. Dad abusing Robitussin, would hallucinate.

And the abandoned father. You know, and it's sad, can't even get your father to come out here and sit in front of the jury and tell them why you left them. You know, why I decided to leave the family and have no contact. Won't do it. Two sons, only sons, charged with capital murder. On trial for their lives. Can't be bothered with that. Can't come to Wichita, Kansas, telling this jury why they should save my sons' lives.

You know we have -- in order to impact all this stuff, to see how it manifests this stuff, We have this thing with Jehovah Witnesses and not celebrate Christmas or any of these little holidays or celebrations. But then when we were -- we are not practicing Jehovah's Witnesses any more, there isn't any reason to celebrate those kinds of things. They are family things. Those are things when we would get together and hold

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each other and bond with each other and talk, work with each other. You know, develop a relationship as a family, understand how it was for somebody

else to have some pain. Understand what it is like to empathize with somebody else. They never had that in their family. Never, ever, and they never learned it. Despite all that, and you know we talked about a lot of bad things with Reginald. We didn't bring any witnesses in here to tell you he's a good guy. Good guys didn't commit the kind of crimes Reggie has been convicted of. Good guys don't go to prison when they are 18 years old and serve five years and come out being called Smoke. That just doesn't happen with good guys.

But Reggie has done some good things in his life. He has tried to be a father. He has tried to maintain some sense of a parent with these children that he has got. He has tried to get them to not make the same mistakes he has done. That is the purpose of those letters. Then there's kids out there that love him, that will continue to love him. They will never see him walking down the streets of Dodge City, going to the park for ice cream, but they can still have

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contact with their father, and their father can still try to instill in them the value of establishing a relationship between the child and the parent. The value of making sure you conform your conduct to the law. Remember that letter that Roshall Cossman read in here where the little boy says, I will be good, daddy, because you told me to. And you got to think about the impact the execution of his father is going to have on Anthony and Regina.

We put in some art work that Reggie did Exhibit A 25, pictures that he drew for his son, daddy and son. Isn't that something? A little cartoon that he wrote, Daddy for Son. I mean, he doesn't have much but he does have something he can contribute to his children. He can only contribute so much from where he is going to spend the rest of his life.

After we have talked about all the bad things that happened in Reggie's life, I mean,, you didn't see any witnesses from the State of Kansas come in here and say I grew up and I lived next to these guys, they had a wonderful home. Reginald, Sr., and Janis didn't ever get in any fights, no domestic violence, kids well cared

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for. You didn't see a forensic psychologist come in here and say the studies from the Department of Justice and the Surgeon General's Office and the FBI, they really apply in this particular case because those are all different. You didn't see anybody come in here and do that. What you saw is people that really took a look at what is going on in this guy's life and try to give you some insight on how he got to the field on December 15th of the year 2000 and how he was able to perpetrate the crimes for which he has been convicted in that horrible manner.

You know, it is extremely difficult as Reggie's lawyer to stand up here and talk to you and come up with the words that I think that might influence you to save his life. But I want you to know that as a juror in this particular case, we all know that you

are smart people. I think that it's -- you are all smart enough to understand that there are certain things about this evidence and some of the argument that you shouldn't buy. For instance, the Dr. Preston, Dr. Pay thing. Dr. Pay says I don't read these but I can see this one. Dr. Preston, who reads them all the time, says this is the way it is.

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And why would he come down here and lie to you about that? Why would he jeopardize a pretty prestigious career? Don't be fooled by thinking we are up here trying to make excuses for Reggie's life.

We are talking about things you need to consider. Reggie is going to be incarcerated. He will be put in prison basically forever. He is going to be caged up. And Reggie needs to be caged up with the lions in the penitentiary, so all of us rabbits will be safe. That's not going to be a problem with us. Reggie is not going to have a good time in prison. Reggie is never going to be able to determine again when he gets up in the morning or when he gets to go to bed at night. He is never going to be able to determine the food he gets to eat or clothes he is going to wear. He is never going to be able to determine who the people he is going to see and when he gets to see them or the circumstances of those visitations, if they occur. Any attachment that he gets with any guards who are going to be supervising him are necessarily going to fade away because nobody works for 50 years. The people he is going to develop his attachment with

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will be transferred, will retire, will quit, will go someplace else. His mother will die while he is in the penitentiary. His father will die while he is in the penitentiary. By the time he is first eligible to see the parole board, if he gets the minimum sentence he can possibly get, his oldest son will be older than Val Wachtel over there. That's how long he is going to be in the penitentiary. He is actually going to be in there forever. He is never going to be able to walk out and get in his car and drive off somewhere and go visit friends. Never going to do any of that stuff that he enjoyed for the brief time that he wasn't incarcerated.

Reggie is going to be punished and Reggie needs to be punished. I got to confess to you that I don't have a lot of experience arguing these kinds of cases, just not been that many around. I like to think I have done this once or twice in regular criminal cases and I like to talk a lot about in closing argument about justice. I don't think there's an argument for justice in this particular case. The decision you guys are going to bring about is where probably one of the most important decisions you

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will make in your life. Certainly the most important decision you will make in Reginald Carr's life and regardless of what your decision is, somebody is not going to be happy. If you decide to execute Reginald Carr, the State of Kansas will be satisfied and perhaps some of the family members of the victims will be placated for a little bit. But that will not

bring them the kind of solace that they deserve in this particular case.

MS. FOULSTON: Your Honor, I object. This is outside the scope of the evidence.

THE COURT: It is indeed.

MR. GREENO: But if you execute Reginald Carr, you create a whole new set of victims, his family, his mother who really has -- she told you she was sorry. She apologized to you for whatever it was she did that was wrong and she didn't know at the time that she was doing anything wrong. His children and the people that do love him now, those people will be victims once again.

MS. FOULSTON: Your Honor, I object to the argument that to follow the law is victimization of the defendants' families.

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THE COURT: I will overrule the objection. Press on.

MR. GREENO: You get to have the opportunity to extend mercy to another human being and a human being that couldn't extend that mercy to another like he failed to do on the night of December 15th. But you have the opportunity to extend that mercy to him. To give him the hope that at some point in time, he may change his life. He may be able to be of some benefit to him. Some day he may be able to say, I am sorry for what I did. And the people -- the families of the victims need to know that. If you vote not to execute Reginald Carr,

and all we need is one of you, all we need is one person that says, you know, I can see where this guy came from. I can see what those doctors were talking about. How he didn't -- how his ability to make those choices was affected and how when, you know, he was thinking about whether or not he should kill those people, their lives just didn't mean that much to him. Reggie's moral compass wasn't thrown away by him, it was taken away from him. You need to understand that that's why I am here telling you, you have the power to save

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somebody's life here. Somebody that may not deserve it for what he has done, but may deserve the torture of prison because of the way he was treated, the way he was brought up, and the way he was formed. We are not born that way. We are formed that way and he didn't ask to be in that family.

I will ask that you go back there and really look at this stuff and certainly decide whether or not these aggravating factors foreclose any mercy in your hearts at all. Any opportunity for Reggie to maintain a relationship with his children, perhaps be the father that his father wasn't. That's what we would ask you to do. Thank you very much.

THE COURT: Let's go ahead, members of the jury, let's go ahead and have a 15-minute recess and we will take the closing arguments of -- Mr. Evans, you are going to speak?

MR. EVANS: Yes.

THE COURT: A 15-minute-recess, members of the jury.

(A recess was taken, after which the following proceedings were had outside the presence of the jury with both defendants being

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present:)

THE COURT: Thank you very much. Ms. Marquez, bring the jury in, please.

MS. FOULSTON: Your Honor, I will -- I have a motion.

THE COURT: You better get at it.

MS. FOULSTON: Your Honor, it seems to me we had a motion in limine with regard to victim impact information and it seemed to me that in his closing argument, Mr. Greeno has opened the door to -- and I am compelled to say I don't understand how they can speak for the victims in this case and their families. And we believe he has opened the door for the prosecutor to be able to respond to these statements that he has made, although there have been a previous motion in limine. We certainly wouldn't want to do anything to violate a Court's order and I wanted to inquire of the Court at this time.

THE COURT: I don't believe he has opened the door up for a full victim impact although a remark answered by the lawyer would be appropriate.

MS. FOULSTON: Thank you.

(The jury returned to the courtroom and the

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following proceedings were had with both defendants present:)

THE COURT: Members of the jury, the closing address for Mr. Jonathan Carr. Mr. Ron Evans on behalf of Mr. Jonathan Carr.

MR. EVANS: Thank you, Your Honor. May it please the Court, counsel, I think you will have heard the last lawyer talk in about an hour and you will have the case. It was said by another lawyer some time a couple of weeks ago that you didn't sign on for this to have something happen and I remember thinking at this time, you know, you didn't sign on for this at all. You were drafted. I signed up for it. This has been a long trial. Ten weeks for me. But I signed on for this and you didn't. And the reason I bring that up, I want to thank you folks because I think you have paid a lot of attention to this case. Regardless of what your verdict is, it is always a pleasure to talk to juries that are serious about their business. You were out parts of three days on that last phase of this trial. I can tell that you worked hard. You looked at everything. You thought about it. You asked a question. You asked a good question and I will

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let it sit with you folks, not that I have a choice, but I feel comfortable letting it sit with you folks.

And I appreciate your attention in this case, tried not to waste your time. Dr. Cunningham might have gone a little long yesterday. I apologize for that. He is a talker.

Now I think you needed to know some things about Jonathan. Maybe won't make any difference to you, but it's my responsibility to tell you some things and to present you some evidence about him before you can sentence him. I don't think you need to know every time he had an upset stomach or a headache or every time he fell down and skinned his knee. We tried not to present that sort of stuff to you because I think it wastes your time. You know, if he had a bad family upbringing, maybe it didn't cause him to do this, maybe it is not a legal difference that you should have found him not guilty of, causing you to find him not guilty of these offenses, but it might have had some impact. And it is for you to decide how much impact a bad family life has. You need to know his parents didn't get along and

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divorced early. You need to know his sister died. I don't know you folks, maybe you had a sibling die young. Maybe that didn't exactly cause the carnage, the horrible thing that happened in this case, but you need to know it. So you need to make of it and give it the weight you think it deserves.

I won't rehash that family chasing each other down the street with bricks and beating each other up with baseball bats. I think you know that this was a bad family situation and you know that

because of what has come out of this family. There was something going on there that wasn't healthy. There was something going on there that caused these young men to sit here facing the death penalty, convicted of these horrible crimes. There was something going on in that house. And we brought you the best information we could as to what was going on.

You needed to know, I think, that when he was in third grade -- when Jonathan was in third grade, he got accused of raping another little girl. Think back to when you were in third grade. Harder for some of us than others, probably, but in third grade you are accused of a

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horrible crime, a crime that your classmates taunt you about. Bear in mind the same time you are accused of this, your family is disintegrating. Your little sister died. Your parents fight, they drink, they drug, and you got this Harvey Rice School thing going on. That's in the newspapers in Cleveland where Jonathan lived in at the time. You are in third grade. It gets so bad that you have to be exiled down to your aunt in Brownsville. I think it would be hard to come through that even if you hadn't done anything wrong at all. Not feeling like when you got to Brownsville there was your aunt and the family that you knew was now 1500 miles away. I think it would be hard for Jonathan not to feel damaged in some way, not worthy in some way.

I think you needed to know that there's a history of mental illness in the family. Not that that makes

him not guilty. You decided that. We didn't allege that or run that defense at you folks. He chose to do what he did. But there is some literature that Dr. Cunningham told you about. There is a reason why that might have affected Jonathan in his development and I think you needed to know it. You needed to know about

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Grandma Barbara and Uncle Mike.

You needed to know about evidence of mental illness in Jonathan. I mean, trying to kill yourself when you are seven by hanging yourself, drinking antifreeze when you are 17 in an attempt to commit suicide is not signs of a healthy mind at work. It is -- I can't think of a more desperate way to try to kill yourself than to drink antifreeze. We didn't just make that up. That's confirmed by other people.

There is something going on with this young man and the way he feels about himself and the way he feels about other people and the respect he has for himself. You know, that's maybe the key thing here. How much respect does somebody have for themselves when they try to kill themselves like that? What was it like for him in school? It is important for you to know something about that. I mean, you know that he has dyslexia. He was held back in middle school. You know that some of the kids teased him because of his learning disability. I think that goes into the respect that he has for himself. And hasn't it been your experience -- some of us has lived longer than others -- but all of us have

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lived long enough to experience one of the truest things you are going to find in this existence. If you don't have respect for yourself, you don't have respect for anybody else.

The things that caused Jonathan to not respect himself are there, things that happened to him in childhood and things that you needed to know about. Do they excuse what you have convicted him of? No. Should you feel sorry for him because he had these things happen to him? I don't care if you do or not. Is it mitigating? Is it something you should consider before you impose the ultimate punishment on him? Absolutely.

Ms. Foulston said that brain injury, the brain abnormality was the foundation of the mitigation. Dr. Preston said a lot of people have that brain injury. He didn't say that brain injury caused Jonathan to do these crimes. Never even went there with it. If someone has a brain injury and it confirms something about an accident that he had with a go cart, and it affects certain parts of the brain that might involve his thought processes, by golly, I think you ought to know it. It's something that's in

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him that you ought to know.

Did it cause him to do this? We have never alleged that. I don't now. Is it a factor in his development? Dr. Cunningham says it is and he showed you the study that indicates that. Dr.

Cunningham told you about the risk factors that the Department of Justice has come up with. Those risk factors as relates to Jonathan, he has 24 of the 26 of them. Risk factors that are predictive of violence. He went through that with you in some detail. I will not rehash it. A lot of those factors -- most of those factors aren't his fault, where he grew up, yet some of them were. You heard something about his drug use. That's his fault. He chose to use drugs. That he chose to drink. Might be mitigated by your family history, by how much self respect you have for yourself, but it is something you ought to consider.

You haven't heard of any serious previous criminal record before this case. He has never been to prison. Now I know he jumped in way over his head and these crimes are as serious as they get, as serious as I have seen. But that is a statutory mitigating factor that you can

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consider, his lack of a serious criminal record prior to these offenses.

His age. Maybe that's not important to most of you. We spent a lot of time picking this jury and if I heard one thing more than practically anything else I heard, if you are old enough to do the crime, you are old enough to face the music. But we all know that, certainly those of us that have lived a while, what you thought about when you were 20 isn't the same thing that you think about when you are 40 or 45 or 50. You change.

Dr. Cunningham gave you some scientific data to support why you change. There are physiological

reasons. The brain continues to develop. Is that an excuse for this crime, the fact that he was young? I am not in the excuse business up here. That's not what this second stage, it's not what this phase is about at all. Not about making excuses. It's about whether he deserves the ultimate punishment.

I would like to talk to you just a minute about his demeanor in this trial. I work in the death penalty phase. I am in the business of representing people that have done horrible

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things, at least they are accused of. But I can tell you it has been a pleasure to represent Jonathan. He sat here. You watched him. You are entitled to observe his demeanor during this trial. He has behaved himself. He has come to court every day, unlike his brother. And he has treated me like a gentleman. It's been my pleasure to represent him.

MS. PARKER: Your Honor, I object to this type of information not in evidence.

THE COURT: Overruled. Press on.

MR. EVANS: And in that line, along with that, there is good in this young man. I know we are here because he has done a horrible thing. But there's good in him. He is not some monster. He behaved monstrously on that night. Why? I don't know. I can't tie something in a ribbon and say, Ah, this is why he did it. There is the explanation for the monstrosity of these crimes. But I can tell you he is not a monster. Leroy and Juanita Culver told you that, that couple from Dodge City. They saw the

good side of him. They saw the side that wanted to learn. They saw the side that wanted to work, that he was on time, and that was actually trying to better

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himself in some way. They saw that side of Jonathan. You saw those folks testify. They didn't strike me as a couple of old fools. They struck me as nice, down-to-earth, common sense people who saw something in this young man that they reacted to. A goodness. A reason why they wanted to drive in here and testify for him. You saw it in Jessie Harris. Never been on a plane before. Still mad at Jonathan. I think Mr. Harris told you it was clear that he feels like he invested some things in Jonathan. He is disappointed and mad at Jonathan. But he is mad because he sees the good in Jonathan, too. He saw it as Jonathan lived with him in Cleveland.

If you decide to exercise the mercy in this case, and I think the reason of what you heard in mitigation outweighs the aggravation, when you add all the different pieces of mitigation up. If you decide, that's true, as I think Mr. Greeno touched on, he is still going to jail for at least 50 years. Now that's 50 years if the Judge decides to give him the minimum sentence on everything, on all of the other counts, the Judge decides to give him as much leniency as he possibly can and run all of those cases

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concurrently with each other. But still the first time he is going to have an opportunity, not a ticket out, but an opportunity to see a parole board to try to convince them that he should be released is 50 years.

You know, any one of you can decide to save this young man's life. Any one of you. You can decide that there is some good there. There is something worth saving. You don't have an opportunity to do that very often in this life, to save another life. You know our instinct to preserve life is amazing. It's there in all of us. If you saw him choking on the floor, you would try to save him right now. You would call 911. Your first instinct would be to preserve life. Life is precious in this world. Those of us who have lost somebody close to us know that. You have that opportunity in this case. You may never have that opportunity again.

And, again, it's been my pleasure to represent him. I contend you will not be saving the life of a monster but the life of a man that has done a horrible thing, a horrible set of things, but that there is some good in him, something worth saving. Like I said, Ladies and

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Gentlemen, it's been my pleasure to try the case in front of you. You paid attention. If you pay attention now, I am sure you will, we have no complaint regardless of what you decide. I am sorry this case has gone on so long. We have asked a lot of you but you have come through splendidly. Thank you.

THE COURT: Thank you.

State's closing argument, Ms. Parker, for the plaintiff, State of Kansas.

MS. PARKER: Ladies and Gentlemen of the Jury, you are the established governing authority over this case. You are the individuals that sit here, who have indicated on voir dire that you have the fortitude, the fortitude to carry out the requirements of the law. This is not about satisfying Kim Parker and Nola Foulston, this is about satisfying the law of the state. And Reginald Carr and Jonathan Carr have rebelled against the authority of the law of this state that was instituted to protect human welfare and human life. They, of their own choice, have brought judgment upon themselves.

You know the law holds no terror for those who do right, only for those who choose wrong.

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And they chose wrong. Their own experts told you, and the evidence that you heard, told you that they made their own choices to choose wrong. They had the ability to choose and their experts told you that they know what is right and what is wrong and Mr. Evans just got up here moments ago to tell you that his client Jonathan has the capacity to be good. They have the capacity to choose right and sit here in Court before you and they did not. They chose the path of evil. You know, this is not -- this is not going to be an enjoyable task for you. This is not going to be fun. It's not going to be a decision that's easy. But it's a decision that is necessitated, necessitated

by the conduct, the chosen exercise of free will conduct of these two men and yet they even stand here before you here today and of all the blame games that have been made, they want to blame you. They want to blame you that perhaps if you follow the law that somehow you are doing something wrong. Passing blame to Mommas and Daddies, society, and taking none upon themselves. These are murders that necessitate that decision of death because of the torture that was inflicted, just as the law says, heinous

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and cruel, because of self-indulgence for monetary gain. Because they intended to leave no witnesses.

That's what the law, that's what the Legislature set out as an aggravator. And that's what they did. To avoid prosecution. To avoid what is now happening to them. They killed. They are morally culpable. They are morally responsible and the flowing of their culpability goes to each because they each had a major participation, neither was minor.

Mitigating circumstances under the law as you remember are those that reduce the degree of moral culpability. How has anything that they have said done that? Under the law, the Legislature said these things may be considered. That they have no significant history of prior criminal activity. Is that what you heard? That this crime was committed when the defendants were under the influence of extreme mental or emotional disturbance. The foundation of all, if any, this brain trauma. The

foundation of all their experts, all the evidence that you heard as Ms. Foulston told you, was based on a manipulated picture, an altered picture. A picture of a PET

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scan that does not accurately reflect, does not accurately reflect their brains and this picture does not accurately reflect who they are. Their participation was equal. Can you tell who the shooter is? Temeka said that Reginald said he was. Jonathan brags about shooting them pop, pop, pop to inmates in the jail.

MR. EVANS: Objection to that, Your Honor. That is not in evidence.

THE COURT: I will sustain the objection. It's not in evidence.

MR. EVANS: Move for a mistrial.

THE COURT: Overruled. Disregard that comment, Members of the Jury, not mine, but the one about the statements by Jonathan Carr.

MS. PARKER: You heard the evidence regarding what was reviewed. You heard in this penalty phase much information about hearsay evidence. The bravado that was taken from each other in order to fulfill the task that allowed them to take all this property from the defendants (sic). Their premeditation, their intent. Did they act under the supreme duress, the stress or substantial domination of another? There's no evidence of that.

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Ask the question regarding their age. They're adult males, ages 20 and 23 when these offenses were committed. We send individuals into war at 18. Are they responsible? Are they morally culpable for their acts? In this instance, they have lived away from home. They were living away from home. They were totally emancipated. They had individuals repeatedly trying to help them, coaches, teachers, SRS workers, all this time through this rough childhood that they had, which they ignored, and made their choices to continue in the acts that they did.

Is a term of imprisonment sufficient to defend and protect and protect the people's safety from the defendants? There is no evidence to suggest it is. In fact, the evidence from the defense indicates that these individuals have no remorse, care not, opportunistic, remorseless. How does that defend?

Dr. Woltersdorf indicated that after giving psychological testing to Reginald Carr, that he was an antisocial personality, otherwise known commonly as a sociopath, opportunistic, self-indulgent. That is who you are sitting in

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judgment of, uncaring individuals. They beg you today for sympathy. They do. They are begging one of you, just one, because that's all they need. They beg one of you for sympathy. They want to get that sympathy by suggesting that their excuse is to deflect the responsibility. They want to beg you for sympathy because of that rough childhood. Because

of some abuses, which are primarily based on the evidence, the requirement to eat noodles with Miracle Whip, vegetables, pasta salad. And to be spanked with a belt while their legs are held down. Is that an insult to children who have been placed in bathtubs until their whole bodies have been burned? Is that an insult to the children who have been beaten and bruised on their whole body by their parents? Is that an insult to children who wished they had a roof over their head? Is that an insult to children who feel like they are starving in all parts of the world? To suggest that gives them a license to kill?

They talked to you about, well, they will be locked up for a long time in a cage. A cage with access to books, library, basketball, daily exercise, TV. They talk to you -- Mr. Greeno

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talked to you -- the audacity to talk about the victims and about how Reginald Carr will never be able to form attachments, never be able to form relationships. Aaron Sanders, Jason Befort Heather Muller, and Brad Heyka will form no more attachments. They don't continue their attachment to their fathers, their mothers, or their siblings, or anyone else for that matter, any future children that they might have had.

MR. EVANS: Your Honor, objection.

THE COURT: Overruled.

MS. PARKER: There are no attachments that they will form.

This thing about the abuse, if you look at the evidence and listen to the evidence; they even try to latch onto abuse of their own cousin Barbara and claim it kind of as their own. Was Reginald, Jr., abandoned by his father? Not according to his own brother Jonathan Carr. They suggest that they couldn't get Reginald Carr, Sr., to come. They had the same power of subpoena that the State has. Maybe there were other reasons he didn't come. When his sons have mercilessly, pitilessly, without conscious committed these vial acts.

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What contribution did Reginald Carr, Jr., make to his child before he was incarcerated? What contribution did he make then? Was he -- after the shooting of Linda Ann Walenta and before Birchwood, my children, I should go back to them. I should go home. At the ATM did he say, So I've got enough money now, let's get out of here. Let's go home to my children. Was he thinking about his children after the blood came from Heather Muller's head? This must stop. My child, my children. Yet he wants you to think about some contact with his children now. Is that just to encourage that contact just to those children?

Did Dr. Preston lie was posed by Mr. Greeno. No. It matters not whether he lies. Did he have motive to lie? While his career, he testified previously as you remember previously in a death penalty case, the first one in the State of Kansas, Gary Kleypas. He is retired. He has a new career. Does he have a reason to promote this type of manipulation? I don't know. You will have to decide.

You decide. These experts that have come before you is their careers. They are professional witnesses. This

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is how they make their money talking to juries like you about stuff like this. Cunningham and Reidy made no attempt to independently verify the things they told you. They relied solely on biased accounts and accounts given of the family members which were even different between themselves. Can you rely on that? Can you rely on that to make that kind of a judgment, and even if you assume a neglectful, abusive childhood; their Mom wasn't there; their aunt wasn't there; their father wasn't there. They were there. They make choices. They make choices and they did and they knew it was wrong. And they didn't care. And they still don't care. No empathy for these people that were shot.

You know, nothing prevents Reginald Carr from changing his life, nothing has. Do that anytime. You won't prevent it by giving the death verdict. He chooses that, too.

Mr. Evans tells you he didn't want to waste our time. He put on extensive evidence, most of the evidence, much of the evidence of expert evidence was based on a manipulated picture. Was that a waste of time?

If Mr. Evans had been at Birchwood, would

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he be pleased to represent Jonathan Carr? Sympathetic to a man who tried to kill himself three years before this, before these acts. Three years before, drank antifreeze like his dogs that somehow got it. Suggests that this isn't about sympathy. But it is because if you look -- if you look at mitigation, you have to look at what mitigation is defined as, reducing culpability. Because someone attempted suicide by drinking antifreeze three years before, three years later.

Well, first, in October, he represents himself as a juvenile when he is really an adult so he can avoid the consequences. Prior to that after drinking the antifreeze, remember he went to Cleveland. What did he do when he was in Cleveland? Well, there was a dispute between Dr. Cunningham and myself as to which of the stolen vehicles in Cleveland if it was the same kind. One he said maybe was a stolen vehicle which I had no other information. The other one was in 1998, he took the keys from the man at a convenience store.

MR. EVANS: Again, objection, Your Honor this is not in evidence.

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THE COURT: I will overrule the objection.

MS. PARKER: He was 18. This is a year later. His attempted suicide, that he is seeking your sympathy about, did not stop him from making that choice that day. Or the choice to give false information about his age a month and a half before

these murders in December. With Jonathan Carr, it is clear that he seeks to avoid the consequences. He suggests to you his age should be considered. Why? Because he doesn't appreciate the consequences of his actions. You know that's not based on the evidence that you have heard. His participation in wearing gloves, trying to run from the police.

Mr. Evans is right, we all do have that instinct to save lives. And if you or anyone other than Reginald Carr or Jonathan Carr had been at 29th and Greenwich, would you have spare anything to spare the lives, to stop the execution of those denied due process? If the death penalty is not warranted for the murders of Aaron Sander, Brad Heyka, Jason Befort and Heather Muller, then what murder would warrant the death penalty if it's not this? It defies logic and reason to think that the tortuous

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slaughter of these four young people who gave no fight, absolutely no fight. They didn't do anything to cause the rage or the loss of control. They submitted, hoping for life, and they got death.

You cannot, as you sit here, you cannot bring these young people back. But you can -- you can go back and deliver a just and legal punishment. And not because you're mad. Not because we're mad. And not because you want revenge. And not for any other base sort of reason. It's because you have looked and listened to all the evidence and the evidence warrants that kind of punishment under the established authority of the law of this state

because the aggravating circumstances, all four proven beyond a reasonable doubt clearly based on the evidence outweigh -- clearly outweigh any and all mitigation.

Anything that would reduce culpability has not been presented here. These defendants have received due process. It is your job and your privilege as jurors to do this duty and to continue to bring a just penalty.

I want to read to you something that was

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said by a doctor in New York. Dr. Willard Gatlin is a medical doctor, about a murder in New York. And he says this. When one person kills another, there is an immediate revulsion at the nature of the crime. But in a time so short as to seem indecent to the members of the personal family, the dead person ceases to exist as an identifiable person. To those individuals and in the community who have good will, who have sympathy and empathy and warmth and compassion, only one of the characters in the drama remains with whom they can commiserate and that is the defendants. The dead person ceases to exist in our everyday reality and become part of a historic event. So we turn away from the past toward the reality because of our natures. And we look at the defendant and sympathize with him. And when that happens, the defendant usurps the compassion that is justly the victims'. And they will steal their victim's moral constituency today with you in the same way that they stole their lives.

Ladies and gentlemen, don't let that happen. Reginald Carr and Jonathan Carr, they do not deserve your sympathy. They don't deserve

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your pity, and they don't deserve your warmth. They don't deserve your mercy because they gave no mercy. Not even on, as you remember, the request, the verbal request of Aaron Sander, did not cause them to give mercy. It did not cause whichever brother was not the shooter to jump on the other's back to help stop this horrific murder. They don't deserve your mercy and they don't deserve your leniency. Deliver a verdict that the law requires under the evidence that you have heard.

* * *

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STATE OF KANSAS)
) ss:
SEDGWICK COUNTY)

CERTIFICATE

I, Connie Uphaus, a Certified Shorthand Reporter, under and by virtue of the laws of the State of Kansas, and a regularly appointed, qualified and acting Official Reporter of the Eighteenth Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in machine shorthand the above and foregoing proceedings in Case Nos. 00 CR 2978 and 00 CR 2979, heard on November 13, 2002, before the Honorable Paul Clark, Judge of Division No. 9 of said court;

That thereafter, upon the written order dated , 2002, I personally prepared the foregoing transcript, by means of computer-aided transcription, consisting of 199 typewritten pages, and that said transcript is a true and correct transcript of my shorthand notes, all to the best of my knowledge and ability.

SIGNED, OFFICIALLY SEALED, and FILED WITH THE CLERK OF THE DISTRICT COURT, 11th Floor, this day of , 2003.

_____

Certified Shorthand Reporter

Connie Uphaus, C.S.R.

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 00 CR 2978
Case No. 00 CR 2979

[Dated November 14, 2002]

THE STATE OF KANSAS,

Plaintiff,

vs.

REGINALD D. CARR,

Defendant.

THE STATE OF KANSAS,

Plaintiff,

vs.

JONATHAN D. CARR,

Defendant.

Volume 47

TRANSCRIPT OF VERDICT –
SENTENCING PHASE

NOVEMBER 14, 2002

Proceedings had before the Honorable Paul W Clark, Judge of Division No. 9 of the District Court of Sedgwick County, Kansas, in the Eighteenth Judicial District, at Wichita, Kansas, on the 14th day of November, 2002.

APPEARANCES:

The State of Kansas appeared by Ms. Nola Foulston, District Attorney, and Ms. Kim Parker and Mr. Kevin O'Connor, Assistant District Attorneys, Sedgwick County Courthouse Annex, 535 N. Main, Wichita, Kansas 67203.

The Defendant Reginald D. Carr, Jr., appeared in person and by Mr. E. Jay Greeno, Attorney at Law, 250 N. Water, Suite 215, Wichita, Kansas 67202 and by Mr. John V. Wachtel, IV, Attorney at Law, 301 N. Main, Suite 1600, Wichita, Kansas 67202.

The Defendant, Jonathan D. Carr, appeared in person and by Mr. Ron Evans and Mr. Mark A. Manna, Attorneys at Law, Death Penalty Defense Unit, 112 SW 6th, Suite 311, Topeka, Kansas 6603,

Connie Uphaus, C.S.R.

* * *

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(The following proceedings were had at 11:27 a.m. on the 14th day of November, 2002, in the presence of the Jury outside of the defendants' presence:)

THE COURT: What time did you want to come back, Mr. Presiding Juror?

MR. BRILEY: 1:20.

THE COURT: The admonition still applies and you know what to do is get all 16 of you back and tell us and you can resume your deliberations. Thank you very much for your work this morning. I will see you at 1:20.

(The proceedings were recessed for the lunch hours after which the following proceedings were had after further deliberations:)

(The time is 5:25 p.m. and the following proceedings were had before the Court with both defendants being present:)

THE COURT: Thank you very much. Ms. Marquez, bring the jury in. Any disruption in the reading of the verdict, I will stop the proceedings, clear the courtroom and continue with the reading.

(The jury returns to the courtroom, and the following proceedings were had with both defendants present.)

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THE COURT: Mr. Presiding Juror, I understand you folks have a verdict.

MR. PRESIDING JUROR: Yes, we do.

THE COURT: Would you hand the forms to the bailiff, please, sir?

(The verdict forms are handed to the bailiff, who in terms hands them to the Judge, after which upon review by the Judge, the forms were read by Ms. Marquez:)

THE COURT: I will approve the verdict as to form. Ms. Marquez, publish the verdict, please, ma'am.

MS. MARQUEZ: On the case of the State of Kansas vs. Reginald D. Carr, Jr., Case No. 00 CR 2978, Verdict Sentencing Phase. On Verdict Form 1, Count 1, capital murder of Heather Muller.

We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Reginald D. Carr, Jr.

As to Count 1, capital murder of Heather Muller, we find unanimously beyond a reasonable doubt that the following aggravating circumstances have been proved to exist.

(1) that the defendant knowingly or purposely killed or created a great risk of death

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to more than one person.

(2) that the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(3) that the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(4) that the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count 1, capital murder of Heather Muller, we find that the proper Sentence for Reginald D. Carr, Jr, is death. Dated the 14th of November, 2002, signed William C. Briley.

Verdict Form 1, Count 2, capital murder, Aaron Sander. We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Reginald D. Carr, Jr.

As to Count 2, capital murder of Aaron Sander, we find unanimously beyond a reasonable doubt that the following aggravated circumstances have been proved to exist:

(1) that the defendant knowingly or purposely

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killed or created a great risk of death to more than one person.

(2) that the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(3) that the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(4) that the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count 2, capital murder of Aaron Sander, we find that the proper sentence for Reginald D. Carr, Jr, is death. Dated the 14th of November, 2002, signd William C. Briley.

Verdict Form 1, Count 3, capital murder of Brad Heyka. We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Reginald D. Carr, Jr.

As to Count 3, capital murder of Brad Heyka, we find unanimously beyond a reasonable doubt that the following aggravating circumstances have been proved to exist.

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(1) that the defendant knowingly or purposely killed or created a great risk of death to more than one person.

(2) that the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(3) that the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(4) that the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count 3, capital murder of Brad Heyka, we find that the proper sentence for Reginald D. Carr, Jr., is death. Dated 14th of November, 2002, signed William C. Briley.

Verdict Form 1, Count 4, capital murder Jason Befort. We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Reginald D. Carr, Jr.

As to Count 4, capital murder of Jason Befort, we find unanimously beyond a reasonable doubt that the following aggravating circumstances have been

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proved to exist.

(1) that the defendant knowingly or purposely killed or created a great risk of death to more than one person.

(2) that the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(3) that the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(4) that the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstance substances found to exist outweigh mitigating circumstances found to exist.

As to Count 4, capital murder of Jason Befort we find that the proper sentence for Reginald D. Carr, Jr., is death. Dated the 14th of November, 2002, signed William C. Briley.

On the case of the State of Kansas vs. Jonathan D. Carr, Case No. 00 CR 2979, Verdict Sentencing Phase.

Verdict Form 1, Count 1, capital murder, Heather Muller. We, the jury, being duly sworn upon

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our oath make the following findings concerning the sentence for the defendant Jonathan D. Carr.

As to Count 1, capital murder of Heather Muller, we find unanimously beyond a reasonable doubt

that the following aggravating circumstances have been proved to exist.

(1) that the defendant knowingly or purposely killed or created a great risk of death to more than one person.

(2) that the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(3) that the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(4) that the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count 1, capital murder of Heather Muller, we find that the proper sentence for Jonathan D. Carr is death. Dated the 14th day of November, 2002, signed William C. Briley.

Verdict Form 1, Count 2, capital murder, Aaron

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Sander. We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Jonathan D. Carr.

As to Count 2, capital murder of Aaron Sander, we find unanimously beyond a reasonable doubt

that the following aggravating circumstances have been proved to exist.

(1) that the defendant knowingly or purposely killed or created a great risk of death to more than one person.

(2) that the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(3) that the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(4) that the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count 2, capital murder of Aaron Sander, we find that the proper sentence for Jonathan D. Carr is death. Dated the 14th of November, 2002, signed william C. Briley.

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Verdict Form 1, Count 3, capital murder Brad Heyka. We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Jonathan D. Carr.

As to Count 3, capital murder of Brad Heyka, we find unanimously beyond a reasonable doubt that

the following aggravating circumstances have been proved to exist.

(1) that the defendant knowingly or purposely killed or created a great risk of death to more than one person.

(2) that the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(3) that the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(4) that the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

As to Count 3, capital murder of Brad Heyka, we find that the proper sentence for Jonathan D. Carr is death. Dated the 14th of November, 2002, signed

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William C. Briley.

Verdict Form 1, Count 4, capital murder Jason Befort. We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Jonathan D. Carr.

As to Count 4, capital murder of Jason Befort, we find unanimously beyond a reasonable doubt

that the following aggravating circumstances have been proved to exist.

(1) that the defendant knowingly or purposely killed or created a great risk of death to more than one person. Two. That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(3) That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(4) That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count 4, capital murder of Jason Befort, we find that the proper sentence for Jonathan D. Carr

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is death. Dated the 14th day of November, 2002, signed William C. Briley.

THE COURT: Members of the Jury, I have a question I will state -- a question I will inquire of you individually for an answer to my question. the question is, was the verdict just read by the bailiff your verdict.

Juror No. 1?

JUROR NO. 1: Yes, Your Honor.

THE COURT: Juror No. 2?

JUROR NO. 2: Yes, Your Honor.

THE COURT: Juror No. 3?

JUROR NO. 3: Yes, Your Honor.

THE COURT: Juror No. 4?

JUROR NO. 4: Yes, Your Honor.

THE COURT: Juror No. 5?

JUROR NO. 5: Yes, Your Honor.

THE COURT: Juror No. 6?

JUROR NO. 6: Yes, Your Honor.

THE COURT: Juror No. 7?

JUROR NO. 7: Yes, Your Honor.

THE COURT: No. 8?

JUROR NO. 8: Yes, Your Honor.

THE COURT: Juror No. 9?

JUROR NO. 9: Yes, Your Honor.

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THE COURT: Juror No. 10?

JUROR NO. 10: Yes, Your Honor.

THE COURT: Juror No. 11?

JUROR NO. 11: Yes, Your Honor.

THE COURT: Juror No. 12?

JUROR NO. 12: Yes, Your Honor.

THE COURT: I will accept your verdict. What I am going to do now is put you back in your jury room. I will come in there in less than five minutes and answer any questions you have of me. Then you will be released from your jury service having completed your duties here. Thank you very much for your work. Go in your jury room. I will be in there in less than five minutes. As soon as I answer any of your questions, you will be free to go.

(The jury leaves the courtroom and the following proceedings are had:)

THE COURT: The sentencing is 10:00 o'clock in the morning. Also I need any motions that will be taken up at that time. I will, as I said, answer any questions the jury has of me. We will give them their documents to take to their employers. I will inquire, Do you want to talk to the lawyers? If they do, I will have them come out here and talk to you all if you want to talk to them. If they want to

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talk to you. If not, I will ask somebody from the Sheriff's Department to walk them to their automobiles until they are safe and off. We are in recess.

MS. FOULSTON: Excuse me, the TV will be of during all of that time.

THE COURT: Absolutely. Thank you very much.

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STATE OF KANSAS)
)
SEDGWICK COUNTY)

CERTIFICATE

I, Connie Uphaus, a Certified Shorthand Reporter, under and by virtue of the laws of the State of Kansas, and a regularly appointed, qualified and acting Official Reporter of the Eighteenth Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in machine shorthand the above and foregoing proceedings in Case Nos. 00 CR 2978 and 00 CR 2979, heard on November 14, 2002, before the Honorable Paul Clark, Judge of Division 9 of said court;

That, therefore, upon the written order dated , I personally prepared the foregoing transcript, by means of computer-aided transcription, consisting of 16 typewritten pages, and that said transcript is a true and correct transcript of my shorthand notes, all to the best of my knowledge and ability.

SIGNED, OFFICIALLY SEALED, and FILED WITH THE CLERK OF HE DISTRICT COURT, 11th Floor, this day of , 2003.

Certified Shorthand Reporter

Connie Uphaus, C.S.R.

VERDICT FORM (1)

COUNT ONE (1)
CAPITAL MURDER
HEATHER MULLER

We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Reginald D. Carr, Jr.:

As to Count One (1), Capital Murder of Heather Muller, we find unanimously beyond a reasonable doubt that the following aggravated circumstance(s) have been proved to exist:

(PLEASE INDICATE BY X IN THE BLANK SPACE)

X 1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

X 2. That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

X 3. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

X 4. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As To Count One (1), Capital Murder of Heather Muller, we find that the proper sentence for Reginald D. Carr, Jr. is death.

Date: 14 Nov. 02 /s/William C. Briley
Presiding Juror

VERDICT FORM (2)

COUNT ONE (1)
CAPITAL MURDER
HEATHER MULLER

As to Count One (1), Capital Murder of Heather Muller, we the jury being duly sworn upon oath find that the aggravating circumstances claimed by the Plaintiff, State of Kansas, have not been proved to exist beyond a reasonable doubt.

Date: _____ _____

Presiding Juror

VERDICT FORM (3)

COUNT ONE (1)
CAPITAL MURDER
HEATHER MULLER

As to Count One (1), Capital Murder of Heather Muller, we the jury being duly sworn upon oath state that we are unable to reach a unanimous verdict sentencing the defendant, Reginald D. Carr, Jr., to death.

(PLEASE INDICATE BY X IN THE BLANK SPACE)

____ A. We are not able to agree unanimously that the evidence proves an aggravated circumstance exists.

____ B. We are not able to agree that the aggravated circumstance(s) that were proved to exist outweighs the mitigating circumstance(s) shown to exist by the evidence.

Date: _____ _____

Presiding Juror

VERDICT FORM (1)

COUNT TWO (2)
CAPITAL MURDER
AARON SANDER

We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Reginald D. Carr, Jr.:

As to Count Two (2), Capital Murder of Aaron Sander, we find unanimously beyond a reasonable doubt that the following aggravated circumstance(s) have been proved to exist:

(PLEASE INDICATE BY X IN THE BLANK SPACE)

X 1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

X 2. That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

X 3. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

X 4. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count Two (2), Capital Murder of Aaron Sander, we find that the proper sentence for Reginald D. Carr, Jr. is death.

Date: 14 Nov 02 /s/William C. Briley
Presiding Juror

VERDICT FORM (2)

COUNT TWO (2)
CAPITAL MURDER
AARON SANDER

As to Count Two (2), Capital Murder of Aaron Sander, we the jury being duly sworn upon oath find that the aggravating circumstances claimed by the Plaintiff, State of Kansas, have not been proved to exist beyond a reasonable doubt.

Date: _____ _____

Presiding Juror

VERDICT FORM (3)

COUNT TWO (2)
CAPITAL MURDER
AARON SANDER

As to Count Two (2), Capital Murder of Aaron Sander, we the jury being duly sworn upon oath state that we are unable to reach a unanimous verdict sentencing the defendant, Reginald D. Carr, Jr., to death.

(PLEASE INDICATE BY X IN THE BLANK SPACE)

____ A. We are not able to agree unanimously that the evidence proves an aggravated circumstance exists.

____ B. We are not able to agree that the aggravated circumstance(s) that were proved to exist outweighs the mitigating circumstance(s) shown to exist by the evidence.

Date: _____ _____

Presiding Juror

VERDICT FORM (1)

COUNT THREE (3)
CAPITAL MURDER
BRAD HEYKA

We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Reginald D. Carr, Jr.:

As to Count Three (3), Capital Murder of Brad Heyka, we find unanimously beyond a reasonable doubt that the following aggravated circumstance(s) have been proved to exist:

(PLEASE INDICATE BY X IN THE BLANK SPACE)

X 1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

X 2. That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

X 3. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

X 4. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count Three (3), Capital Murder of Brad Heyka, we find that the proper sentence for Reginald D. Carr, Jr. is death.

Date: 14 Nov 02 /s/William C. Briley
Presiding Juror

VERDICT FORM (2)

COUNT THREE (3)
CAPITAL MURDER
BRAD HEYKA

As to Count Three (3), Capital Murder of Brad Heyka, we the jury being duly sworn upon oath find that the aggravating circumstances claimed by the Plaintiff, State of Kansas, have not been proved to exist beyond a reasonable doubt.

Date: _____ _____
Presiding Juror

VERDICT FORM (3)

COUNT THREE (3)
CAPITAL MURDER
BRAD HEYKA

As to Count Three (3), Capital Murder of Brad Heyka, we the jury being duly sworn upon oath state that we are unable to reach a unanimous verdict sentencing the defendant, Reginald D. Carr, Jr., to death.

(PLEASE INDICATE BY X IN THE BLANK SPACE)

_____ A. We are not able to agree unanimously that the evidence proves an aggravated circumstance exists.

_____ B. We are not able to agree that the aggravated circumstance(s) that were proved to exist outweighs the mitigating circumstance(s) shown to exist by the evidence.

Date: _____ _____

Presiding Juror

VERDICT FORM (1)

COUNT FOUR (4)
CAPITAL MURDER
JASON BEFORT

We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Reginald D. Carr, Jr.:

As to Count Four (4), Capital Murder of Jason Befort, we find unanimously beyond a reasonable doubt that the following aggravated circumstance(s) have been proved to exist:

(PLEASE INDICATE BY X IN THE BLANK SPACE)

X 1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

X 2. That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

X 3. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

X 4. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count Four (4), Capital Murder of Jason Befort, we find that the proper sentence for Reginald D. Carr, Jr. is death.

Date: 14 Nov 02

/s/William C. Briley
Presiding Juror

VERDICT FORM (2)

COUNT FOUR (4)
CAPITAL MURDER
JASON BEFORT

As to Count Four (4), Capital Murder of Jason Befort, we the jury being duly sworn upon oath find that the aggravating circumstances claimed by the Plaintiff, State of Kansas, have not been proved to exist beyond a reasonable doubt.

Date: _____ _____

Presiding Juror

VERDICT FORM (3)

COUNT FOUR (4)
CAPITAL MURDER
JASON BEFORT

As to Count Four (4), Capital Murder of Jason Befort, we the jury being duly sworn upon oath state that we are unable to reach a unanimous verdict sentencing the defendant, Reginald D. Carr, Jr., to death.

(PLEASE INDICATE BY X IN THE BLANK SPACE)

____ A. We are not able to agree unanimously that the evidence proves an aggravated circumstance exists.

____ B. We are not able to agree that the aggravated circumstance(s) that were proved to exist outweighs the mitigating circumstance(s) shown to exist by the evidence.

Date: _____ _____
Presiding Juror

VERDICT FORM (1)

COUNT ONE (1)
CAPITAL MURDER
HEATHER MULLER

We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Jonathan D. Carr:

As to Count One (1), Capital Murder of Heather Muller, we find unanimously beyond a reasonable doubt that the following aggravated circumstance(s) have been proved to exist:

(PLEASE INDICATE BY X IN THE BLANK SPACE)

X 1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

X 2. That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

X 3. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

X 4. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As To Count One (1), Capital Murder of Heather Muller, we find that the proper sentence for Jonathan D. Carr is death.

Date: 14 Nov 02 /s/William C. Briley
Presiding Juror

VERDICT FORM (2)

COUNT ONE (1)
CAPITAL MURDER
HEATHER MULLER

As to Count One (1), Capital Murder of Heather Muller, we the jury being duly sworn upon oath find that the aggravating circumstances claimed by the Plaintiff, State of Kansas, have not been proved to exist beyond a reasonable doubt.

Date: _____ _____
Presiding Juror

VERDICT FORM (3)

COUNT ONE (1)
CAPITAL MURDER
HEATHER MULLER

As to Count One (1), Capital Murder of Heather Muller, we the jury being duly sworn upon oath state that we are unable to reach a unanimous verdict sentencing the defendant, Jonathan D. Carr to death.

(PLEASE INDICATE BY X IN THE BLANK SPACE)

____ A. We are not able to agree unanimously that the evidence proves an aggravated circumstance exists.

____ B. We are not able to agree that the aggravated circumstance(s) that were proved to exist outweighs the mitigating circumstance(s) shown to exist by the evidence.

Date: _____ _____

Presiding Juror

VERDICT FORM (1)

COUNT TWO (2)
CAPITAL MURDER
AARON SANDER

We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Jonathan D. Carr:

As to Count Two (2), Capital Murder of Aaron Sander, we find unanimously beyond a reasonable doubt that the following aggravated circumstance(s) have been proved to exist:

(PLEASE INDICATE BY X IN THE BLANK SPACE)

X 1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

X 2. That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

X 3. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

X 4. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count Two (2), Capital Murder of Aaron Sander, we find that the proper sentence for Jonathan D. Carr is death.

Date: 14 Nov 02 /s/William C. Briley
Presiding Juror

VERDICT FORM (2)

COUNT TWO (2)
CAPITAL MURDER
AARON SANDER

As to Count Two (2), Capital Murder of Aaron Sander, we the jury being duly sworn upon oath find that the aggravating circumstances claimed by the Plaintiff, State of Kansas, have not been proved to exist beyond a reasonable doubt.

Date: _____ _____

Presiding Juror

VERDICT FORM (3)

COUNT TWO (2)
CAPITAL MURDER
AARON SANDER

As to Count Two (2), Capital Murder of Aaron Sander, we the jury being duly sworn upon oath state that we are unable to reach a unanimous verdict sentencing the defendant, Jonathan D. Carr to death.

(PLEASE INDICATE BY X IN THE BLANK SPACE)

____ A. We are not able to agree unanimously that the evidence proves an aggravated circumstance exists.

____ B. We are not able to agree that the aggravated circumstance(s) that were proved to exist outweighs the mitigating circumstance(s) shown to exist by the evidence.

Date: _____ _____

Presiding Juror

VERDICT FORM (1)

COUNT THREE (3)
CAPITAL MURDER
BRAD HEYKA

We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Jonathan D. Carr:

As to Count Three (3), Capital Murder of Brad Heyka, we find unanimously beyond a reasonable doubt that the following aggravated circumstance(s) have been proved to exist:

(PLEASE INDICATE BY X IN THE BLANK SPACE)

X 1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

X 2. That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

X 3. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

X 4. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count Three (3), Capital Murder of Brad Heyka, we find that the proper sentence for Jonathan D. Carr is death.

Date: 14 Nov 02 /s/William C. Briley
Presiding Juror

VERDICT FORM (2)

COUNT THREE (3)
CAPITAL MURDER
BRAD HEYKA

As to Count Three (3), Capital Murder of Brad Heyka, we the jury being duly sworn upon oath find that the aggravating circumstances claimed by the Plaintiff, State of Kansas, have not been proved to exist beyond a reasonable doubt.

Date: _____ _____

Presiding Juror

VERDICT FORM (3)

COUNT THREE (3)
CAPITAL MURDER
BRAD HEYKA

As to Count Three (3), Capital Murder of Brad Heyka, we the jury being duly sworn upon oath state that we are unable to reach a unanimous verdict sentencing the defendant, Jonathan D. Carr to death.

(PLEASE INDICATE BY X IN THE BLANK SPACE)

____ A. We are not able to agree unanimously that the evidence proves an aggravated circumstance exists.

____ B. We are not able to agree that the aggravated circumstance(s) that were proved to exist outweighs the mitigating circumstance(s) shown to exist by the evidence.

Date: _____ _____

Presiding Juror

VERDICT FORM (1)

COUNT FOUR (4)
CAPITAL MURDER
JASON BEFORT

We, the jury, being duly sworn upon our oath make the following findings concerning the sentence for the defendant Jonathan D. Carr:

As to Count Four (4), Capital Murder of Jason Befort, we find unanimously beyond a reasonable doubt that the following aggravated circumstance(s) have been proved to exist:

(PLEASE INDICATE BY X IN THE BLANK SPACE)

X 1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

X 2. That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

X 3. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

X 4. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

We find unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

As to Count Four (4), Capital Murder of Jason Befort, we find that the proper sentence for Jonathan D. Carr is death.

Date: 14 Nov 02 /s/William C. Briley
Presiding Juror

VERDICT FORM (2)

COUNT FOUR (4)
CAPITAL MURDER
JASON BEFORT

As to Count Four (4), Capital Murder of Jason Befort, we the jury being duly sworn upon oath find that the aggravating circumstances claimed by the Plaintiff, State of Kansas, have not been proved to exist beyond a reasonable doubt.

Date: _____ _____

Presiding Juror

VERDICT FORM (3)

COUNT FOUR (4)
CAPITAL MURDER
JASON BEFORT

As to Count Four (4), Capital Murder of Jason Befort, we the jury being duly sworn upon oath state that we are unable to reach a unanimous verdict sentencing the defendant, Jonathan D. Carr to death.

(PLEASE INDICATE BY X IN THE BLANK SPACE)

_____ A. We are not able to agree unanimously that the evidence proves an aggravated circumstance exists.

_____ B. We are not able to agree that the aggravated circumstance(s) that were proved to exist outweighs the mitigating circumstance(s) shown to exist by the evidence.

Date: _____ _____

Presiding Juror

No. 14-449, 450

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR AND
REGINALD DEXTER CARR, JR.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR PETITIONER

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com
Counsel for Petitioner

June 2015

Becker Gallagher Cincinnati, OH Washington, D.C. · 800.890.5001

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the trial court's decision not to sever the sentencing phase of the co-defendant brothers' trial here—a decision that comports with the traditional approach preferring joinder in circumstances like this—violated an Eighth Amendment right to an "individualized sentencing" determination and was not harmless in any event?

2. Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

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OPINIONS BELOW

The decisions of the Kansas Supreme Court are reported, *State v. R. Carr*, 331 P.3d 544 (Kan. 2014), *State v. J. Carr*, 329 P.3d 1195 (Kan. 2014), and are reproduced as appendices to the respective Petitions for Writ of Certiorari.

JURISDICTION

The Kansas Supreme Court decided these cases July 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "... nor shall any State deprive any person of life, liberty, or property without due process of law ...." U.S. Const. amend. XIV.

STATEMENT OF THE CASE[1]

A. The Multiple Violent Crimes Underlying These Cases.

Reginald Carr, Jr., and Jonathan Carr, brothers, were charged, jointly tried, convicted, and sentenced for crimes committed in a series of *three* violent incidents in December 2000 in Wichita, Kansas.

1. **The Schreiber Carjacking**. In the first incident, on December 7, 2000, the respondents carjacked Andrew Schreiber and drove to various ATMs, forcing Schreiber at gunpoint to withdraw money from his bank account. The Carrs ultimately abandoned Schreiber in a rural area after taking his watch, striking him in the head with a gun, and shooting out the tires of his vehicle. RC App. 29-32.

2. **The Walenta Murder**. Four days later, the respondents followed Linda Ann Walenta to her home. As she pulled into her driveway, one of the Carrs approached her vehicle and pointed a gun through the driver's side window. Walenta attempted to reverse her vehicle and was shot. She survived for a few days, but died from the shooting. RC App. 33-35.

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[1] Kansas will refer to the appendices to the Petitions for Writ of Certiorari by utilizing "RC App." for *Kansas v. Reginald Carr*, No. 14-450, and "JC App." for *Kansas v. Jonathan Carr*, No. 14-449. When the cited material in the appendices is the same, Kansas cites the "RC App." The parties deferred the printing of the Joint Appendix until after the Respondents' briefs were filed. After the printing and filing of the Joint Appendix, Kansas filed this brief substituting "JA" citations where possible.

3. **The Birchwood Rapes, Torture, Robberies, and Multiple Murders**. The third and final incident began on December 14, 2000, at a Birchwood neighborhood home shared by three young men, Aaron S., Brad H., and Jason B. Two women, Holly G. and Heather M., also were at the home that night. RC App. 35.

Shortly after the occupants of the house went to bed, the Carrs, armed with guns, forced their way inside. They rounded up the occupants, gathered them into one bedroom, and demanded money. When the victims said they had no cash, the Carrs demanded ATM cards. The Carrs also ordered the victims to remove their clothes and forced all five into a closet. RC App. 35-36.

The Carrs then removed the two women from the closet and forced them to perform oral sex on each other and to penetrate each other with their fingers, while the Carrs watched and gave instructions. Next, the Carrs brought the male victims out of the closet one at a time and ordered each to have sexual intercourse with Holly G. The Carrs threatened to shoot the men if they did not perform. When one victim said he would not do it, he was struck in the back of the head with a hard object. RC App. 37-38.

The Carrs next ordered each of the men to have sexual intercourse with Heather M. After these numerous coerced sex acts, Reginald drove Brad H. to several ATMs to withdraw money. While they were gone, Jonathan raped Holly G., and then raped or attempted to rape Heather M. RC App. 38-39, 61.

Brad H. and Reginald returned after about 30 minutes, and Reginald then took Jason B. to two ATMs to withdraw money. Upon their return, Reginald took Holly G. to several ATMs to withdraw money. Finally, Reginald returned with Holly G. and took Aaron S. to withdraw money. RC App. 39-41, 62-63.

When Reginald and Aaron S. returned, Reginald raped Holly G. and forced her to perform oral sex. Meanwhile, Jonathan raped Heather M. again, and then raped Holly G. again. RC App. 41-42.

After these rapes, the Carrs forced the men into the trunk of Aaron S.'s car, put Heather M. in the back seat of the car, and put Holly G. in the passenger seat of Jason B.'s truck. Jonathan drove Aaron S.'s car, followed by Reginald driving Jason B.'s truck. The Carrs drove to a soccer field and ordered all of the victims out, forcing them to kneel in a line. The Carrs then shot each of the five victims in the back of the head, and drove away. RC App. 43-44, 57-58.

Miraculously, Holly G. survived. The bullet fired at her head fractured her skull, but did not enter her brain, apparently because a plastic hairclip she was wearing deflected the bullet. The impact stunned Holly G., but she remained kneeling until one of the Carrs kicked her to the ground. She could hear the Carrs talking, and felt the impact when one of them drove Jason B.'s truck over her body as they left. RC App. 44-46, 57.

After the Carrs left the murder scene, Holly G. got up and used the only piece of clothing she had in a futile effort to bandage Jason B.'s fatal head wound. She then spotted lights from a house in the distance.

Naked, barefoot, shot in the back of the head, and having been run over by a vehicle, she somehow managed to travel more than a mile through snow and over fences to reach the house. RC App. 44, 57, 496.

Holly G. pounded on the door and awoke the homeowners, who took her inside and called 911. Holly G. survived her numerous serious injuries. The other four victims, however, died. Holly G. provided police with details of these heinous crimes and eventually would testify against the Carrs at trial. RC App. 44-45, 57-58.

Soon after the murders the police apprehended Reginald. When he was arrested, Reginald had a gas card bearing Jason B.'s name, a watch that belonged to Heather M., and $996. Inside the apartment where the police arrested Reginald, they found numerous additional items belonging to the four murder victims and Holly G. RC App. 51-52.

Meanwhile, Jonathan was at a friend's apartment. When the friend and her mother saw news footage of Reginald's arrest and learned that police were looking for another individual, they grew suspicious of Jonathan and called police. Police arrived and apprehended Jonathan. Like Reginald, Jonathan had property of the victims, including the engagement ring Jason B. had purchased for, but not yet given to, Holly G. RC App. 52-55.

B. The Extensive Trial and Detailed Penalty Proceedings.

The Carrs were charged with and convicted of numerous offenses arising from their crime spree, including the felony murder of Walenta, and four

capital murders of Aaron S., Brad H., Jason B., and Heather M. RC App. 25-27. They were tried jointly in the guilt phase.

After both Carrs were convicted of capital murder, the court conducted a joint penalty proceeding. The State's case-in-chief for the penalty phase consisted solely of relying on the State's guilt-phase evidence already presented. JA 73-74. The State argued that the guilt-phase evidence established four aggravating factors applicable to each Carr:

> (1) That the defendant knowingly or purposely killed or created a great risk of death to more than one person.
>
> (2) That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.
>
> (3) That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.
>
> (4) That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

RC App. 502-503, 505-506.

In mitigation, the Carrs offered extensive evidence of their childhoods, including various events, incidents, and experiences. They presented that evidence through the testimony of family members, in particular their mother, sister, an aunt and two cousins. Sentencing Tr. Vol. 41-A, at 36-138, Vol. 41-B, at 31-48 (mother); Vol.

41-B, at 64-121 (sister); Vol. 41-B, at 122-141, Vol. 43-B, at 52-142 (aunt); Vol. 42, at 106-141 (cousin); Vol. 45-B, at 142-152, Vol. 46, at 5-26 (cousin). Each Carr also presented a forensic psychologist to testify as an expert about the psychological effects each Carr's childhood had on him. Sentencing Tr. Vol. 43-A, at 17-123, Vol. 43-B, at 5-50 (Dr. Reidy for Reginald); Vol. 45-A, at 4-145, Vol. 45-B, at 4-140 (Dr. Cunningham for Jonathan). They also presented a retired medical doctor, Dr. Preston, as an expert witness, who opined that both Reginald and Jonathan showed abnormal brains on PET scans performed in preparation for these cases. Sentencing Tr. Vol. 42, at 6-105.

Reginald presented evidence that he tries to be a good father to his three children. Sentencing Tr. Vol. 42, at 113-114, 172-173, 181. Jonathan presented evidence that he was considered a good kid growing up, and some evidence that he was negatively influenced by his brother. *E.g.*, Sentencing Tr. Vol. 41A, at 116; Vol. 42, at 149; Vol. 43-A, at 6.

The only evidence that the State responded to with rebuttal evidence was the expert testimony that each brother showed brain abnormalities. In that regard, the State presented a neuroradiologist, Dr. Pay, who testified that the PET scans of Reginald and Jonathan showed normal brains. Sentencing Tr. Vol. 46, at 34-90. In any event, in closing argument, Jonathan's counsel acknowledged that the "brain injury" evidence was not intended to show that a brain injury caused Jonathan to commit the crimes or somehow excused his commission of the crimes. JA 429.

The State did not contest that the Carrs had troubled childhoods, that their parents had many problems, that Reginald took some actions to be a good parent to his children, that Jonathan was considered by some to be a good kid growing up, or that Jonathan was influenced at times by his older brother. All of that evidence was essentially uncontested.

At the close of the sentencing phase evidence, the trial court conducted a jury instruction conference that was extremely short, taking up less than five pages in the transcript. JA 373-376. Neither defendant objected to the instructions on mitigation. Nor did either defendant propose a mitigation instruction that said anything about burden of proof. Nor did either defendant suggest or argue that the instructions as proposed would confuse the jurors because the instructions included a "beyond a reasonable doubt" burden of proof for aggravating factors but no burden of proof for mitigating circumstances. *Id.*

The trial court instructed the jury that, in determining the sentence for each defendant, "you should consider and weigh everything admitted into evidence during the guilt phase or the penalty phase of this trial that bears on either an aggravating or a mitigating circumstance." Instruction No. 2, RC App. 500. Further, the trial court emphasized to the jury that "[y]ou must give separate consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him. Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant." Instruction No. 3, RC App. 501.

With respect to mitigation, the trial court instructed the jury that "you may consider sympathy for a defendant," and the "appropriateness of exercising mercy can itself be a mitigating factor ...." Instructions No. 6, 8, RC App. 503, 507. The court went on to emphasize that the

> determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her decision.

Instructions No. 6, 8, RC App. 504, 507. The trial court then instructed the jury on six statutory mitigating circumstances (no prior criminal history, mental or emotional disturbance, defendant was a relatively minor accomplice, extreme duress or domination by another, term of imprisonment will protect the public, and age of the defendant), but made clear that mitigating circumstances, unlike aggravating factors, were not limited to the statutory list: "You may further consider as a mitigating circumstance *any other factor* which you find may serve as a basis for imposing a sentence of less than death. Each of you must consider every mitigating circumstance found to exist." Instruction Nos. 6, 8, RC App. 505, 508 (emphasis added).

During closing arguments, neither Carr tried to put the blame on the other, nor did either Carr argue that he was less culpable than the other. Instead, both Carrs focused on evidence of their childhoods, arguing that such a background favored giving them life sentences rather than death. JA 405-423, 426-433.

Furthermore, the Carrs' closing arguments emphasized the individuality of each defendant, with counsel for Reginald arguing at length about the reasons to show mercy to Reginald. Referring to "Reggie" numerous times, Reginald's counsel detailed the mitigating evidence relating to "Reggie," and never once mentioned "Jonathan." JA 405-423. Similarly, though briefer overall in his closing, Jonathan's counsel referred to Reginald only once and even then not by name, when he mentioned that Jonathan "has come to court every day, unlike his brother." JA 431. Also, Jonathan's counsel emphasized that "[y]ou know, any one of you can decide to save this young man's life. Any one of you." JA 433.

Simply put, the vast majority of sentencing phase evidence was not antagonistic as between the two Carrs, nor did either Carr, much less both, attempt in closing argument to put the blame for the crimes on the other. Instead, each Carr focused his efforts to establish mitigating circumstances on demonstrating his individual history, his upbringing, his family situation, and his life experiences. JA 405-423, 426-433.

The jury explicitly found the existence of all four of the aggravating factors the State alleged for each defendant, and that those factors were not outweighed by any mitigating circumstances. Verdict Form (1),

JA 461-462 (Reginald); JA 477-478 (Jonathan). The jury declined to utilize either of the other two verdict forms provided. *See* Verdict Form (2), JA 463 (Reginald) (to be used if the jury found no aggravating circumstances had been proved beyond a reasonable doubt); JA 479 (Jonathan) (same); Verdict Form (3), JA 464 (Reginald) (to be used if the jury was unable to reach a unanimous verdict sentencing the defendant to death); JA 480 (Jonathan) (same).

The trial court sentenced both Reginald and Jonathan to death for the capital murder convictions. The court gave each a life sentence for the Walenta murder, and additional terms of imprisonment for other convictions. RC App. 27.

C. The Kansas Supreme Court Reversed The Death Sentences.

The Kansas Supreme Court affirmed 32 of Reginald's 50 convictions, including one count of capital murder. RC App. 28. The court also affirmed 25 of Jonathan's 43 convictions, including one count of capital murder. JC App. 26.

But a majority of the court reversed the death sentences, finding three constitutional errors in the penalty proceedings, two of which are under review here: (1) each Carr's Eighth Amendment right to an individualized sentencing determination was violated by the trial court's decision not to sever their penalty phase proceedings, RC App. 404-414, JC App. 45; and (2) the trial court's failure to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt violated the Eighth

Amendment. RC App. 445-446, JC App. 47.[2] This Court granted review of these two issues.[3]

One justice dissented on both issues, and would have affirmed the death sentences. RC App. 483-497; JC App. 65-66. Another justice dissented only from the jury instructions holding. RC App. 481-483; JC App. 63-65.

1. The Majority Ruled That Failure To Sever The Penalty Phase Was Constitutional Error.

a. Failure to Sever for Reginald Carr

For the severance issue, the Kansas Supreme Court only discussed Reginald's claim in full. The court began by observing that Reginald asserted the failure to sever "violated his Eighth Amendment to the United States Constitution right to an individualized capital sentencing determination ...." RC App. 404-405. The court then asserted that "J.Carr makes at least one distinct argument in favor of severance in the penalty phase: He asserts the joint trial inhibited the jury's individualized consideration of him because of family

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[2] In deciding this issue, the Kansas Supreme Court relied on its opinion in *State v. Gleason*, 329 P.3d 1102 (2014), released only one week earlier, to explain its reasoning. This Court granted review of *Gleason*, No. 14-452, which is being briefed and argued simultaneously with these cases.

[3] The third constitutional error the Kansas Supreme Court found was that the Carrs' Sixth Amendment right to confrontation was violated by the admission of hearsay evidence in the sentencing phase. RC App. 421-424. The State included that question in its petitions, but the Court has taken no action on that question.

characteristics tending to demonstrate future dangerousness that he shared with his brother." *Id.* at 405. The court also noted that "[a]lthough R. Carr's visible handcuffs are not specified as another source of prejudice to J. Carr, they also factor into our decision ...." *Id.*

The Kansas Supreme Court purported to acknowledge that the Eighth Amendment "does not categorically mandate separate penalty phase proceedings for each codefendant in a death penalty case." RC App. 406. The court then proceeded to identify what appear to be its three main rationales for finding error in the trial court's decision not to sever the penalty phase here:

(1) Because capital sentencing is about moral culpability, "mercy from a single juror is all it takes to send a capital defendant to prison rather than to execution," thus "[m]ercy may overcome even the most obvious imbalance between forceful evidence of aggravators from the State and a defense mitigation case that is so weak it would not pull the skin off a rice pudding," RC App. at 408-409;

(2) J. Carr's lawyer cross-examined the codefendants' sister, Temica, and elicited a statement from Temica that Reginald may have told her, during

a visit to him in jail, that he was the shooter, *id.* at 409-410[4]; and

(3) "[T]his is a rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic." *Id.* at 411. The court's only explanation for the third rationale was that "the maelstrom that was [the codefendants'] family and their influence on and interactions with one another, including testimony that tended to show that R. Carr was a corrupting influence on J. Carr," *id.*, required the legal conclusion that "the penalty phase evidence simply was not amenable to orderly separation and analysis." *Id.*

After concluding that the failure to sever the penalty phase violated the "Eighth Amendment right to an individualized capital sentencing," RC App. 412, the Kansas Supreme Court very briefly considered the following question: "Can this error be considered harmless?" *Id.* The court articulated the harmless error standard as "not whether a death penalty sentence would have been imposed but for the error," *id.* at 413,

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[4] The court recognized that Temica's testimony might have been admitted against R. Carr (who called her as his mitigation witness) in a penalty phase proceeding even if severed, RC App. 409, that there is no evidence the State was aware that she might give such testimony (it was very "possible that the State was completely unaware of R. Carr's admission to Temica," *id.* at 410), and that when the State did cross-examine Temica she was vague and equivocal: "I believe I heard him tell me something like that. I don't remember ... like when he asked me who he shot and all that, I don't remember who was, you know, shot by who." *Id.* Furthermore, the vast majority of Temica's testimony was about family dynamics and childhood experiences, because she is the oldest child in the family. *See* JA 131-158.

but instead as "whether the death verdict actually rendered in this trial was surely unattributable to the error." *Id.*

The court's sole sentence of "rationale" applying this standard consists of the following:

> The evidence that was admitted, the especially damning subset of it that may not have been admitted in a severed proceeding, and the hopelessly tangled interrelationship of the mitigation cases presented by the defendants persuades us that the jury could not have discharged its duty to consider only the evidence limited to one defendant as it arrived at their death sentences.

Id. Thus, the Kansas Supreme Court concluded that "[w]e cannot say that the death verdict was unattributable, at least in part, to this error," *id.*, and it reversed Reginald's death sentence.

b. Failure to Sever for Jonathan Carr

For Jonathan Carr's claim regarding severance, the Kansas Supreme Court said very little, summarizing its conclusion: "A majority of six members of the court" find a constitutional violation (1) "for the reasons explained in Section P1 of the R. Carr opinion," (2) "because of the family circumstances argument raised by J. Carr," and (3) "the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase." JC App. 45. With that, the Kansas Supreme Court reversed Jonathan's death sentence.

2. The Majority Ruled That The Instructions Violated The Eighth Amendment Because They Failed To Affirmatively Inform The Jury That Mitigating Circumstances Need Not Be Proven Beyond A Reasonable Doubt.

The Kansas Supreme Court resolved the mitigation instruction question on the basis of its then recent decision in *Kansas v. Gleason*, and commented only minimally as follows:

> When nothing in the instructions mentions any burden other than "beyond a reasonable doubt," jurors may be "prevented from giving meaningful effect or a reasoned moral response to" mitigating evidence, implicating a defendant's right to individualized sentencing under the Eighth Amendment. *State v. Gleason*. This is unacceptable.
>
> Were we not already vacating R. Carr's death sentence on Count 2 and remanding the case because of Judge Clark's failure to sever the penalty phase, error on this issue would have forced us to do so.

RC App. 446 (full citations omitted).

3. One Dissent Disagreed That Failure To Sever Was Constitutional Error And Both Dissents Disagreed That There Was Error In The Instructions.

The dissenting justice[5] on severance observed that the "majority's discussion finding an Eighth Amendment violation" in the trial court's failure to sever the penalty phase proceedings was "logically flawed and, at times, difficult to follow." RC App. 487. Further, with regard to harmless error, "the majority's nearly nonexistent analysis goes entirely awry." *Id.*

The dissent found any concern about codefendants attempting to put the blame on each other both insufficient to justify severance generally, and misplaced here, especially, because "most of the two brothers' mitigating evidence was not antagonistic." RC App. 489. Furthermore, the fact that Temica's statements "might not have been admitted in the penalty phase of a separate trial" did not create a "constitutional violation." *Id.*

The dissent harshly criticized the majority's "unsupported" analysis that the "jury did not follow its explicit instructions" to consider each defendant individually. RC App. 490. Indeed, the "majority's logic overlooks that this jury had already demonstrated its ability to differentiate ... when it refused to convict Jonathan Carr on counts related to the Schreiber incident." *Id.* "Instead, the majority vaguely offers a

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[5] The dissenting justice on this issue was former Kansas Supreme Court Justice Nancy Moritz, who is now a judge on the U.S. Court of Appeals for the Tenth Circuit.

statement I cannot even loosely characterize as logical ...." *Id.* Thus, the dissent simply could "not agree with the highly flawed and limited rationale offered by the majority for finding constitutional error ...." *Id.*

Assuming for the sake of argument that error had occurred, the dissent "strongly disagree[d] with the majority's conclusory, one-paragraph harmless-error analysis ...." RC App. 491. "Reginald Carr's death penalty verdict must be attributed to the overwhelming evidence of extreme terror, humiliation, pain, and anguish inflicted upon the multiple victims." *Id.* In fact, the dissent had "no hesitation whatsoever in concluding that when viewed in light of the record as a whole [any prejudice from joinder] had little, if any, likelihood of changing the jury's ultimate conclusion ...." *Id.* at 493. The jurors "heard overwhelming and convincing evidence of heinous and atrocious acts committed by Reginald Carr," including from "Holly, the unintended survivor of this savage attack. It is nearly impossible to convey in a few short paragraphs the overwhelming nature of that evidence." *Id.* at 493-494.[6]

The dissent concluded that the trial court did not err in refusing to sever J. Carr's penalty phase, JC Pet. App. 65, and that, "even considering a joinder error in the penalty phase, I would affirm the jury's imposition of the death penalty for Jonathan Carr." *Id.* at 65-66. The "mitigating evidence simply pales in comparison to the aggravating circumstances," *id.* at 66, and thus

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[6] The dissent summarized that evidence in seven paragraphs, RC App. 494-496, but in the interests of brevity the State addresses that summary below in Section I.B.2. of the Argument.

"beyond a reasonable doubt [] the jury's decision to impose the death penalty was not attributable to any joinder error below." *Id.* To the contrary, "the jury imposed a sentence of death because it understood that the horrendous circumstances called for that sentence." *Id.*

With respect to the mitigation instructions issue, two Justices dissented, with Justice Biles issuing a shortened version of his dissent in *Kansas v. Gleason*.[7]

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[7] Kansas' opening brief in *Kansas v. Gleason* describes the dissent in *Gleason*. Kansas will not repeat that discussion here.

SUMMARY OF THE ARGUMENT

Nothing in this Court's precedents mandates severance in capital cases as an Eighth Amendment requirement to insure defendants receive individualized sentencing. The Kansas Supreme Court's reasoning and holding in these cases—which effectively makes severance mandatory, given that codefendants are likely to always try to lessen their own moral culpability in comparison to each other—is contrary to the long-standing preference for joint trials in the criminal justice system. *Richardson v. Marsh*, 481 U.S. 200, 209-210 (1987); *Zafiro v. United States*, 506 U.S. 534 (1993). Nothing about the Carrs' penalty proceedings required severance here.

"Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Richardson*, 481 U.S. at 210. But, "[e]ven apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.* Furthermore, "it seems obvious that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase: if two different juries were to be required, such testimony would have to be presented twice, once to each jury." *Lockhart v. McCree*, 476 U.S. 162, 181 (1986).

The "individualized sentencing" principle is not incompatible with joint penalty phase proceedings, and may even be enhanced in such proceedings. The same considerations that favor joinder in the guilt phase

remain in play during the sentencing phase. Forcing the States to utilize multiple, separate, and largely repetitive sentencing hearings before the same jury or even different juries would have several undesirable consequences. Such an approach could permit one or more capital defendants to preview the State's penalty phase evidence and arguments, increasing the possibility of inconsistent and inequitable verdicts. Such an approach also would greatly increase the time commitments of jurors and the resources required to try these proceedings. Lastly, mandating separate, repetitive proceedings also could work to the detriment of victims who might have to testify in multiple proceedings.

Instead, the rule is that jury instructions are sufficient to cure any risk of prejudice from joinder. *Zafiro*, 506 U.S. at 540-541. Contrary to the holding of the Kansas Supreme Court, juries can be presumed to follow instructions explicitly informing them each defendant must be given *individualized* consideration in determining the sentences. This Court long has embraced and emphasized the presumption that juries follow their instructions. *Richardson*, 481 U.S. at 211; *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (*per curiam*); *Blueford v. Arkansas*, 566 U.S. ___, 132 S. Ct. 2044, 2051 (2012). No logical rationale exists to disregard the presumption here.

Further, there is no Eighth Amendment right to have a capital sentencing jury consider mercy. *California v. Brown*, 479 U.S. 538 (1987) (jury can be instructed not to consider mercy or sympathy); *see also Saffle v. Parks*, 494 U.S. 484 (1990) (contention that Eighth Amendment requires jury be allowed to base

capital sentencing decision on sympathy for defendant would be a "new rule" not applicable on federal habeas review). As a result, the Eighth Amendment cannot mandate separate sentencing proceedings on the rationale that "mercy" can only be fully considered in separate proceedings. Again, the Kansas Supreme Court erred.

Finally, joinder is erroneous only when a defendant can demonstrate actual and substantial prejudice, an extremely high standard, and one that is rarely met. Here, neither Carr can meet that high standard. Moreover, any potential risk was cured both by the instructions and the separate verdict forms. The Kansas Supreme Court's flimsy "rationales" for its contrary conclusions simply do not withstand scrutiny. Ultimately, the evidence supporting a death sentence for each defendant in this case was overwhelming. The repeated torture each defendant inflicted on the victims was horrific.

Just as there was no basis in the Court's precedents for the Kansas Supreme Court's severance rulings, there likewise is nothing in the Court's precedents justifying the Kansas court's holding that the Eighth Amendment requires a jury in a death penalty proceeding to be *affirmatively instructed* that mitigating circumstances need *not* be proven beyond a reasonable doubt. Indeed, that holding stands in stark contrast to this Court's precedents, and is both legally and logically insupportable. Instead, the controlling constitutional standard here is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

Boyde v. California, 494 U.S. 370 (1990). The *Boyde* Court relied on three factors to make that determination, and those three factors demonstrate there was no error here.

First, the language of the instructions did not impose *any* burden of proof on the Carrs to prove mitigating circumstances. In *Buchanan v. Angelone*, 522 U.S. 269 (1998), the Court made clear that the Eighth Amendment does not require detailed instructions on mitigation, or that any particular requirements for mitigation be included in the jury instructions. Instead, the Court emphasized that, with respect to mitigation, the Eighth Amendment only requires "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant evidence." 522 U.S. at 276. Otherwise, "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Id. See also Weeks v. Angelone*, 528 U.S. 225 (2000) (same holding).

Second, in this case, as in *Boyde*, the State did not vigorously contest the existence of the mitigating circumstances presented, apart from a battle of the experts on whether the Carrs actually presented evidence of demonstrable brain abnormalities. Rather, the State focused its argument on the *weight* the jury should give the proposed mitigators. *Third*, the parties' closing arguments, the final factor under *Boyde*, properly emphasized each juror's role to act individually and independently to consider all mitigating evidence.

Applying the *Boyde* standard and factors here, there is no reasonable likelihood that jurors applied the instructions to prevent the consideration of any relevant mitigating evidence, or to prevent them from giving whatever individual effect they chose to such evidence. Thus, there was no Eighth Amendment violation, and the Kansas Supreme Court was wrong.

ARGUMENT

I. The Joint Penalty Phase Proceeding Did Not Violate The Eighth Amendment. Severance Decisions Are Reviewed Only For An Abuse Of Discretion And Require Defendants To Meet A High Burden Not Satisfied Here.

Despite purporting to acknowledge that severance is not constitutionally required in all capital penalty phase proceedings, the Kansas Supreme Court effectively established a *per se* rule requiring severance. Kansas will refute each of the Kansas Supreme Court's rationales for that result below. But there can be no doubt that the Kansas Supreme Court ultimately found that the failure to sever the penalty phase for these two capital defendants was Eighth Amendment error because, in that court's view, the defendants each failed to receive the "individualized sentencing" this Court has determined the Eighth Amendment requires.

The Kansas Supreme Court's ultimate conclusion appears to rest on three primary contentions. *First*, the court opined that the differentiation in the moral culpability of codefendants necessarily affects the jury's ability to individually apply *mercy* to each defendant, effectively making joinder in the penalty phase constitutionally problematic in any capital case. RC App. 407-409. *Second*, the court opined that some evidence potentially harmful to Reginald *might* not have been admitted in his sentencing proceeding had he not been joined with Jonathan. *Id.* at 409-411. *Third*, the court opined that any severance problem could not be cured by the jury instructions (which properly and explicitly informed the jury that it was to

consider each defendant and the evidence against him *individually*), allegedly because "this is a rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic." *Id.* at 411. Thus, the Kansas Supreme Court concluded that "the penalty phase evidence simply was not amenable to orderly separation and analysis," which resulted in an Eighth Amendment violation. *Id.* at 411-412.

That conclusion is wrong as a matter of federal constitutional law for several reasons. First, codefendants will virtually always attempt to distinguish their moral culpability to avoid death sentences, and capital sentencing schemes typically permit them to do so as part of their mitigation argument. *See, e.g.*, 18 U.S.C. § 3592(a)(4) (Jury may consider as mitigating factor that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death."). Moreover, many capital sentencing schemes, like the Kansas scheme, permit defendants to seek "mercy" from the jury and allow the jury to consider mercy. Thus, the Kansas Supreme Court's first rationale for finding an Eighth Amendment violation here effectively creates a *per se* bar against joinder in the penalty phase of capital cases under several capital sentencing regimes.

Second, the evidence about which Reginald complains was in fact offered by a witness he called; it was not elicited by the State, and ultimately the witness (his sister) equivocated significantly in her testimony. The Kansas Supreme Court recognized that the most it could say was that this evidence "might" not have been admitted if there were separate penalty proceedings, and the court further recognized the State

did nothing improper. That is not the stuff of which Eighth Amendment violations are made.

Finally, the Kansas Supreme Court did not offer anything in support of its bald assertion that here the court could not accept the presumption that jurors follow their instructions—not one sentence, not one citation, and not one shred of evidence that such a foundational presumption should be thrown out the window. Instead, the Kansas Supreme Court's finding of an Eighth Amendment violation runs contrary to almost 200 years of American legal history, and conflicts with the strong, traditional presumptions in favor of joinder in criminal cases and that juries can and do follow their instructions.

A. The Reasons Joinder Is Generally Proper And Desirable Apply Fully Here. The Eighth Amendment Does Not Create A *Per Se* Bar To Joinder In Capital Cases.

1. As A General Rule, Joinder Is Strongly Favored, And There Is No Need For A Special Or Contrary Rule In Capital Cases.

a. This Court's Cases Strongly Favor Joinder.

The Court first addressed a challenge to the joint trial of capital defendants almost 200 years ago; the Court quickly and soundly rejected the challenge. In *United States v. Marchant & Colson*, 25 U.S. (12 Wheat.) 480 (1827), the question was "whether two or more persons, jointly charged in the same indictment with a capital offence, have a *right*, by the laws of the country, to be tried severally, separately, and apart ...."

Id. at 480. Writing for the Court, Justice Story declared "it is a matter of discretion in the Court, and not of right in the parties." *Id.*

The Court found no right to compel severance in federal statutes, noting that "if the right can be maintained at all, it must be as a right derived from the common law ...." 25 U.S. at 480. The Court pointed to Hawkins, *Pleas of the Crown*, for the proposition that the common law "plainly supposes that it is in the election of the prosecutor whether there should be a joint or separate trial." *Id.* at 483. Otherwise,

> [i]f there had been any known right in the prisoner to control this election, it seems incredible that so accurate and learned an author should not have stated it, when the occasion indispensably required him to take notice of a qualification so important to his text. His silence is, under such circumstances, very significant.

Id. Thus, the Court concluded that the question of severance "is a matter of sound discretion, to be exercised by the Court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence." *Id.* at 485.

This Court's respect for the principles recognized in *Marchant & Colson* has not changed or waned over

time. Instead, the Court has reaffirmed the discretionary nature of severance decisions,[8] and continued to express a clear preference for joint trials in criminal cases generally. Most notably, perhaps, in *Zafiro v. United States*, 506 U.S. 534 (1993), the Court spoke emphatically of the "preference in the federal system for joint trials of defendants who are indicted together." *Id.* at 537. Pointing out that joint trials play a vital role and serve the interests of justice, the Court observed that "[f]or these reasons, we repeatedly have approved of joint trials." *Id.*

In *Zafiro*, the defendants urged the Court to "adopt a bright-line rule, mandating severance whenever codefendants have conflicting defenses." 506 U.S. at 538. But the Court declined to do so, because "[m]utually antagonistic defenses are not prejudicial *per se*," *id.*, and "the tailoring of relief to be granted, if any, [is left] to the district court's sound discretion." *Id.* at 539. Instead, a party seeking severance has to demonstrate serious and actual prejudice: the complainant's burden is to establish that "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent

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[8] *See, e.g.*, *Opper v. United States*, 348 U.S. 84, 95 (1954) ("It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of discretion when petitioner's motion for severance was overruled.") *United States v. Lane*, 474 U.S. 438, 449 (1986) ("In common with other courts, the Court long has recognized that joint trials 'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.'") (quoting *Bruton v. United States*, 391 U.S. 123, 134 (1968)).

the jury from making a reliable judgment about guilt or innocence." *Id.*

Even when a serious risk of prejudice is shown, the Court in *Zafiro* observed that "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." 506 U.S. at 539. Moreover, the Court emphasized two additional considerations that generally weigh against severance. *First*, "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Id.* at 540. *Second*, generally any risk of prejudice "is of the type that can be cured with proper instructions, and 'juries are presumed to follow their instructions.'" *Id.* at 540-541 (quoting *Richardson*, 481 U.S. at 211).

In other cases, the Court has emphasized that "[j]oint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Richardson*, 481 U.S. at 210. But, "[e]ven apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.*

The strong general presumption in favor of joinder, and the foundations on which it rests, are not so ephemeral that they evaporate and disappear in capital proceedings merely because codefendants may attempt to distinguish their respective moral culpability by possibly blaming each other. In fact, both this Court and the Circuits have recognized the value of utilizing a single jury for capital cases in a variety of circumstances.

b. The Court Has Recognized The Value And Propriety Of Having A Single Jury In Capital Cases Generally, And Of Joinder In The Analogous Context Of A Non-Capital Defendant Tried With A Capital Codefendant.

This Court has recognized the propriety and desirability of having a single jury hear entire capital cases, and of joinder in circumstances that raise similar considerations to those at issue in this case. First, in *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court considered and rejected Eighth Amendment challenges to Arkansas' use of a "unitary jury in capital cases." *Id.* at 180. The Court noted that it had upheld the Georgia system against a similar attack in *Gregg v. Georgia*, 428 U.S. 153 (1976), and then proceeded to discuss two critical reasons why a unitary jury makes sense in capital cases: (1) "the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase," 476 U.S. at 181; and (2) "it seems obvious that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase: if two different juries were to be required, such testimony would have to be presented twice, once to each jury." *Id.*

Second, the Court has rejected the claim that a non-capital defendant's guilt phase proceeding cannot be joined with a capital codefendant. In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), a juvenile defendant was charged with non-capital murder in connection with a robbery, rape, and murder in which his adult codefendant was charged with capital murder.

Defendant argued that his Sixth Amendment jury trial rights were violated because in their joint trial he was tried by a "death-qualified" jury due to his codefendant's capital murder charge.

The Court rejected the claim, pointing out that the State has an "interest in promoting the reliability and consistency of its judicial process, an interest that may benefit the noncapital defendant as well." *Id.* at 418. The Court emphasized that '[i]n joint trials, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials." *Id.* Such a perspective "is particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events." *Id.* Furthermore, the State has a legitimate "concern that it not be required to undergo the burden of presenting the same evidence to different juries where, as here, two defendants, only one of whom is eligible for a death sentence, are charged with crimes arising out of the same events." *Id.* at 418-419.

Kansas recognizes that this case involves two capital defendants, and they are making an Eighth Amendment claim about their joint penalty proceeding, obvious factual differences from *Buchanan*. Nonetheless, the interests the Court addressed in *Buchanan* are front and center here, including the many advantages of joint trials for defendants as well as the interests of justice.

c. The Reasons For Permitting Joinder Apply Fully In Capital Sentencing Proceedings And, In Some Respects, With Special Force.

The reasons that support joinder apply with full force to capital proceedings, including capital sentencing proceedings. As this Court has recognized, "[i]n joint trials, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials." *Buchanan*, 483 U.S. at 418. Such a perspective "is particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events." *Id.* Furthermore, the State has a legitimate "concern that it not be required to undergo the burden of presenting the same evidence to different juries where, as here, two defendants ... are charged with crimes arising out of the same events." *Id.* at 418-419.

Moreover, "[j]oint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Richardson*, 481 U.S. at 210. But, "[e]ven apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.* Furthermore, "it seems obvious that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase: if two different juries were to be required, such testimony would have to be presented twice, once to each jury." *Lockhart*, 476 U.S. at 181.

Even when a risk of prejudice from joinder is shown, this Court in *Zafiro* observed that "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." 506 U.S. at 539. Indeed, generally any risk of prejudice "is of the type that can be cured with proper instructions, and 'juries are presumed to follow their instructions.'" *Id.* at 540-541 (quoting *Richardson*, 481 U.S. at 211).

The Circuits have recognized that the Eighth Amendment does not prohibit joint capital proceedings. For instance, in *Puiatti v. McNeil*, 626 F.3d 1283 (11th Cir. 2010), the Court of Appeals noted that, "[a]lthough [defendant's] argument intertwines severance and individualized sentencing," *id.* at 1308, those are separate arguments, and the two are not incompatible:

> although Puiatti attempts to connect and intertwine severance with his constitutional right to an individualized sentencing determination, we can locate, and Puiatti has cited, no Supreme Court decision doing so. *Lockett* and its progeny do not address joint penalty phases or say that the presence of a co-defendant at a capital defendant's penalty phase trial has any Eighth Amendment implications whatsoever. None of the *Lockett* line of cases relates to severance or helps Puiatti's claim at all. Puiatti ... cites no precedent that suggests a joint penalty trial is improper for co-defendants who were properly joined in the guilt phase. The Supreme Court has never intimated, much less held, that the special concerns in capital cases require, or even suggest, that severance is necessary.

Id. at 1315. In fact, a joint proceeding "avoid[s] the inequity of inconsistent verdicts and one capital defendant going second with the benefits of previewing the State's evidence and arguments." *Id.* at 1318. Further, "the *Lockett-Eddings-Penry-Abdul-Kabir* principle that the sentencer must be allowed to consider and give effect to 'all relevant mitigating evidence,' is quite compatible with a joint trial." *Id.*

Likewise, in *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), the Fourth Circuit readily identified several reasons supporting joinder in capital sentencing proceedings: (1) the relevant federal statutes "require that ... the penalty hearing shall be conducted before the same jury that determined guilt," so severance "would have required [multiple] separate, largely repetitive penalty hearings before this jury," *id.* at 892; (2) the same considerations that favor joinder in the guilt phase "must remain generally in play at the penalty phase," *id.*; (3) any potential risk to individualized sentencing "could not of course have been entirely removed by conducting three sequential, largely repetitive hearings before the same jury," *id.*; (4) "More critically, ... the court's frequent instructions on the need to give each defendant's case individualized consideration sufficed," *id.*; and (5) individual consideration was emphasized by "the court's submission of separate packets of penalty verdict forms for each defendant." *Id.* at 893. *See also United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002) (affirming denial of motion to sever capital penalty phase proceedings).

The Circuits, faithfully applying this Court's precedents, have gotten it right. The Kansas Supreme Court stands alone and was wrong.

2. Jurors Are Presumed To Follow Their Instructions, And There Is No Reason Not To Follow That Foundational Principle Here.

In concluding that reversal was required, the Kansas Supreme Court turned an unquestioned legal presumption on its head by refusing to believe the jury could follow the instructions given here, instructions that plainly required the jury to give each defendant *individualized* consideration in determining the sentences. The court's rejection of such a foundational principle is both unwarranted and contrary to the *Zafiro* holding that any risk of prejudice arising from joint proceedings generally can be cured by giving proper jury instructions. 506 U.S. at 539.

In fact, if courts begin to question the presumption that juries follow their instructions, judges will be invited by disappointed litigants to second-guess the unexplained decisions of juries. This Court has explained that "the jury system is premised on the idea that rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions." *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (*per curiam*). Thus, the Court long has embraced the presumption:

> The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a

> reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.

Richardson, 481 U.S. at 211.

The presumption is not discarded or altered in capital cases: "Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions." *CSX Transp.*, 556 U.S. at 841. Moreover, this Court has applied the presumption in capital cases on a number of occasions. *See, e.g.*, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions"); *Blueford v. Arkansas*, 566 U.S. ___, 132 S. Ct. 2044, 2051 (2012) (same).

Here, in fact, the jury was explicitly instructed in ways that made clear each juror's obligation to consider the defendants individually. For example, the trial court expressly instructed the jury, at the *commencement* of the penalty proceeding, that "[i]t is the responsibility of the jury to decide the proper sentence for the *individual* defendant in these [the capital murder] counts." JA 60. (emphasis added). The trial court repeated that instruction at the end of the penalty phase as well, just before the court read the jury all of the instructions. JA 378. At the conclusion of the penalty phase, the court instructed the jury as follows:

> You must give separate consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him.

> Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant.

RC App. 501 (Instruction No. 3). Furthermore, the jury was given several individual instructions for each defendant. In other words, there was an instruction on aggravating circumstances for Reginald (Instruction No. 5, RC App. 502-03), and one for Jonathan (Instruction No. 7, RC App. 505-506). There was a mitigation instruction for Reginald (Instruction No. 6, RC App. 503-505), and one for Jonathan (Instruction No. 8, RC App. 507-508).

Finally, the verdict forms and accompanying instructions also distinguished the two defendants. First, the jury was instructed that "[w]hen considering an *individual* defendant," the jury must find that there are one or more aggravators and that they outweigh any mitigation beyond a reasonable doubt. RC App. 509 (Instruction No. 10) (emphasis added). That same instruction tells the jury that "[i]f you sentence the *particular* defendant to death," then the jury is to use Verdict Form (1). *Id.* (emphasis added). In addition, the trial court gave the jury separate verdict forms for each defendant. JA 387. There were three forms for each of the four capital murder counts. The first verdict form for Reginald, the one the jury used for all four capital counts, found specific aggravating factors, found "unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist," and found "the proper sentence for Reginald D. Carr is death."

JA 461-462, 465-466, 469-470, 473-474.[9] The first form for Jonathan, also the one the jury used for all four capital counts, was identical except the jury found "the proper sentence for Jonathan D. Carr is death." JA 477-478, 481-482, 485-486, 489-490.

Thus, the jury instructions and the verdict forms plainly distinguished between the two defendants, curing any risk of prejudice from joinder.[10] The Kansas Supreme Court offered no legal or logical reason for discarding the presumption in this case, nor did it point to any evidence in the record indicating or even remotely suggesting that the jury might not have followed its instructions to consider each defendant individually. Instead, the court just baldly asserted that there was a serious and presumed risk that the jurors did not follow their instructions. That is not law, nor is it traditional judicial review.

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[9] The second verdict form was to be used if the jury found that no aggravating circumstances had been proved beyond a reasonable doubt. JA 463. The third verdict form was to be used if the jury could not unanimously agree that a death sentence was proper. JA 464.

[10] Notably, this same jury already had proven its ability to distinguish between the Carrs and assess the evidence against each individually when in the guilt phase the jury acquitted Jonathan Carr of counts against him regarding the carjacking of Andrew Schreiber, but convicted Reginald. RC App. 174; JC App. 25.

3. Because There Is No Eighth Amendment Right To Have A Capital Sentencing Jury Consider "Mercy," There Can Be No Entitlement To Separate Penalty Phase Proceedings On That Basis.

The Kansas Supreme Court erred when it relied on the proposition that severance was required in order to give full effect to the jury's ability to consider "mercy" in sentencing. Again, neither defendant was prevented from presenting any allegedly mitigating evidence, or from making any and all arguments to the jury about sparing their lives, including a request for mercy. Further, the jurors were instructed to consider each defendant individually. That ought to be the end of the matter.

But the Kansas Supreme Court at least implied, if not effectively held, that because Kansas generously permits capital sentencing juries to consider "mercy,"[11] the Eighth Amendment requires that any capital codefendants in Kansas necessarily have to be sentenced separately in order for the jury to evaluate "mercy" for each individual. Such a conclusion has no basis in federal constitutional law.

First, consideration of mercy is not required by the Eighth Amendment. This Court has held that States instead constitutionally may preclude capital sentencing juries from considering "mercy," and may explicitly instruct juries that they "must not be swayed

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[11] In this case, the jury was instructed, "mercy can itself be a mitigating factor in determining whether the state has proved beyond a reasonable doubt that the death penalty should be imposed." RC App. 503-504.

by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *California v. Brown*, 479 U.S. 538 (1987). *See Saffle v. Parks*, 494 U.S. 484 (1990) (contention that Eighth Amendment requires that juries be allowed to base capital sentencing decision on sympathy for defendant would be a "new rule" not applicable on federal habeas review). State courts, likewise, uniformly have rejected the notion that consideration of "mercy" is a federal constitutional requirement. *See e.g. People v. Lewis*, 28 P.3d 34, 75 (Cal. 2001) (Eighth Amendment does not require an instruction stating "[i]n determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant."); *State v. Lafferty*, 20 P.3d 342, 373 (Utah 2001) (federal constitution does not require an instruction telling jurors they should be guided by mercy); *State v. Johnson*, 723 N.E.2d 1054, 1076, 1080 (Ohio 2000) (summarily finding no Eighth or Fourteenth Amendment error in instruction that "fairness" and "mercy" are to be excised from the definition of mitigating factors); *Commonwealth v. Rainey*, 656 A.2d 1326, 1333-1334 (Pa. 1995) (counsel was not ineffective for failing to request a mercy instruction since allowing the jury unbridled discretion to grant mercy would be clearly erroneous).

Second, the Kansas Supreme Court's effective holding does not follow from its apparent premise. There is absolutely nothing inconsistent about permitting the jury to consider "mercy" and conducting a joint penalty phase proceeding. Indeed, the presence of more than one defendant may in fact work to the advantage of one or more other defendants in this

regard, by helping the jury to more accurately assess the defendants' relative blameworthiness and culpability. Severance might well, in effect, work to the *detriment* of some capital defendants when it comes to "mercy." Thus, this "rationale" of the Kansas Supreme Court is inherently intertwined with that court's rejection of the foundational principle that jurors are presumed to follow their instructions which explicitly tell the jury to consider each defendant individually.

Ultimately, the Kansas Supreme Court has essentially held that the federal constitution mandates automatic severance of all capital sentencing proceedings in which a jury is permitted to consider "mercy," even though the Constitution does not require that capital juries even be allowed to consider "mercy." Such a holding extends the Eighth Amendment's "individualized sentencing" requirement well beyond the Court's precedents, and produces illogical results. The fact that Kansas gives juries broad discretion to consider mitigation should not count against Kansas in determining whether severance was constitutionally required here.

B. Severance Decisions Are Subject Only To Abuse Of Discretion Review And Require Defendants To Satisfy A High Burden, One Not Met Here By Either Carr.

This Court long has recognized that severance decisions are subject only to abuse of discretion review by appellate courts. *E.g.*, *Zafiro v. United States*, 506 U.S. 534 (1993); *Opper v. United States*, 348 U.S. 84, 95 (1954). Although the Court has not been more specific in its review of severance decisions, many Circuits have been quite clear about the high burden a defendant

challenging joinder has to meet. Reading this Court's precedents, the Circuits have stated that a "district court's decision to deny severance is 'virtually unreviewable' and will be overturned only if a defendant can demonstrate prejudice 'so severe that his conviction constituted a miscarriage of justice and that the denial of his motion constituted an abuse of discretion.'" *United States v. Fazio*, 770 F.3d 160, 165-66 (2d Cir. 2014) (internal citations omitted).

Similarly the Circuits emphasize that the defendant challenging joinder bears a "heavy burden," *e.g.*, *United States v. Thornton*, 1 F.3d 149, 153 (3d Cir. 1993); *United States v. McConnell*, 749 F.2d 1441, 1444 (10th Cir. 1984), to show "compelling, specific, and actual prejudice," *e.g.*, *Thornton*, 1 F.3d at 153; *United States v. Driver*, 535 F.3d 424, 427 (6th Cir. 2008); *United States v. Wheeler*, 802 F.2d 778, 782 (5th Cir. 1986); *United States v. Gonzalez*, 804 F.2d 691, 694-95 (11th Cir. 1986), or "real," "actual," or "clear" prejudice. *E.g.*, *United States v. Abfalter*, 340 F.3d 646, 652 (8th Cir. 2003); *McConnell*, 749 F.2d at 1444; *United States v. Clark*, 989 F.2d 1490, 1499 (7th Cir. 1993); *United States v. Pindell*, 336 F.3d 1049, 1057 (D.C. Cir. 2003).

1. Neither Carr Met The "Heavy Burden" Of Establishing "Compelling, Specific, And Actual Prejudice."

a. There Was No Compelling, Specific, And Actual Prejudice To Reginald Carr.

In reversing Reginald's death sentence based on the failure to sever the penalty proceedings, the court relied on the following factors: (1) Jonathan "continued

the pattern he had set in the guilt phase by emphasizing that [Reginald] was the more culpable actor and a negative influence in [Jonathan's] life," RC App. 406; (2) this mitigating factor created antagonistic defenses because the mitigation evidence differentiated between the brothers' moral culpability and could have impacted a juror's decision to show mercy, RC App. 407-409; (3) Jonathan's cross-examination of Temica resulted in her testimony that, during a visit she made to Reginald when he was in jail awaiting trial, he may have admitted to shooting the victims, RC App. 409-410; (4) Temica's testimony could have negated any juror's willingness to show mercy based on residual doubt regarding Reginald, or a belief that Jonathan was the shooter, RC App. 410; and (5) Jonathan's mitigating evidence could have been considered by the jury as improper, nonstatutory aggravating evidence against Reginald. RC App. 411.

None of these "rationales" or the record supports a finding that there was compelling, specific and actual prejudice to Reginald. First, reading the penalty phase transcripts and the parties' closing arguments belies the suggestions that Jonathan's defense against the death penalty was to blame Reginald, or that their defenses were inherently or even significantly antagonistic. Quite the contrary, the vast majority of the mitigation evidence was overlapping and complementary in showing and describing the childhood experiences and family circumstances that the brothers had shared. JA 79-85, 87, 92-94, 98; Sentencing Tr. Vol. 41-A, at 44-45, 63-65, 78 (mother); JA 134-135, 145-147 (sister); JA 345-346, 348-350 (cousin).

To similar effect, one forensic psychologist testified about Reginald's childhood and its effects on him, JA 224, 227-228, 234-237, 240-241; a different forensic psychologist testified about the same matters with regard to Jonathan. Sentencing Tr. Vol. 45-A at 89, 93-94, 115-116, 129-133, 136; Vol. 45-B, 11-12, 17-20. In addition, an expert opined that both Carrs showed demonstrable brain abnormalities. JA 202; Sentencing Tr. Vol. 42, at 53. No expert opined that Reginald was the more culpable actor, or that Jonathan was less culpable.

Finally, one will search the closing argument of Jonathan's counsel in vain for any suggestion that Jonathan was seeking mercy by blaming Reginald. Instead, just as Reginald did, Jonathan primarily argued that his horrible childhood and bad life experiences should sway the jury to give him a life sentence. JA 425-431.[12]

The only other "prejudice" the Kansas Supreme Court found was Reginald's complaint that his sister equivocally suggested he may have told her that he shot some or all of the victims. But it is important to remember that Temica was Reginald's witness, and he called her to testify as part of his mitigation case. Furthermore, the State did not elicit the testimony

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[12] There is absolutely no basis for the Kansas court's assertion that Jonathan's evidence might somehow have been relied upon by the jury as "nonstatutory" aggravation, not least because the jury was plainly instructed that it could consider only the aggravating circumstances the State asserted. RC App. 503, 506. Further, the court does not even identify what evidence Jonathan presented that arguably would fall into a category of "nonstatutory" aggravation as opposed to mitigation.

about which Reginald complains, and in any event Temica's testimony was vague and equivocal.

The initial, brief statements Temica made came in response to questions from Jonathan's counsel:

> Q. Did Reggie tell you [during a visit she made to him when he was in jail] he was the one who shot those people?
>
> A. Yes.
>
> Q. Did he tell you he shot all of them?
>
> A. I don't remember the conversation.

JA 158. When the State later questioned Temica she said the following:

> Q. And you told us that your brother Reginald Carr said that he personally shot these people?
>
> A. I believe I heard him tell me something like that. I don't remember.
>
> Q. You don't remember?
>
> A. Right. I believe he told me something like that, but like when he asked me who he shot and all that, I don't remember who was, you know, shot by who.

JA 180-181.

The Kansas Supreme Court recognized that the most it could say was that this evidence "might" not have been admitted if there were separate penalty proceedings, and the court further recognized that the State did nothing improper. This short and equivocal

testimony, from one of Reginald's own witnesses, testimony that very possibly would have been presented even in a separate penalty proceeding, does not meet the heavy burden of showing compelling, specific and actual prejudice to Reginald.

b. There Was No Compelling, Specific, And Actual Prejudice To Jonathan Carr.

In reversing Jonathan's death sentence, the Kansas court summarily adopted the findings it had made in Reginald's appeal, and without explanation added that the court was relying on the "family circumstances argument" raised by Jonathan, and on prejudice to Jonathan from Reginald's visible handcuffs during the penalty phase. JC App. 45.

The court's reasoning, however, is inherently flawed because the same rationales cannot be applied to both Reginald and Jonathan. Remember, it was *Jonathan's counsel* who elicited the testimony from Temica about Reginald's alleged jailhouse confession. JA 158. Necessarily, even if there was evidence of Reginald's heightened culpability presented in the sentencing proceeding, such evidence likely would have helped Jonathan, not prejudiced him.

The Kansas Supreme Court's rationales regarding Reginald utterly fail to resolve Jonathan's severance claim in his favor. Indeed, the court never articulated how the failure to sever prejudiced Jonathan in any way. Further, although the State is largely at a loss to know what the "family circumstances" argument consists of (Jonathan made no argument about "family circumstances" in his briefs in the Kansas Supreme

Court, much less in his brief in opposition to Kansas' petition for writ of certiorari in this Court), even assuming that notion is based on expert and other testimony about Reginald's and Jonathan's childhoods, the evidence also clearly differentiated between the two of them. None of the evidence about Reginald was attributed to Jonathan.

For instance, Jonathan lived with an aunt in Texas for over a year when he was nine, and then in Ohio for a portion of time during his teenage years while Reginald was in prison. In fact, this was the evidence Jonathan relied on to argue "grave emotional harm" from his separation from his family, especially his siblings, at various times in his life. Sentencing Tr. Vol. 45-A, at 106. He also presented witnesses who testified that he was a good person and good worker while in Ohio. Other witnesses who knew him from a construction job in Dodge City, Kansas, testified that Jonathan was a good kid when they knew him. Sentencing Tr. Vol. 42, at 143, 149, 160-161; Vol. 43-A, at 6. Additionally, there was evidence that Jonathan attempted to commit suicide at least once, if not twice, prior to committing the crimes in these cases. Sentencing Tr. Vol. 45-A, at 89, 104.

Finally, the Kansas Supreme Court's single, unexplained assertion that Reginald wearing visible handcuffs during the penalty phase proceeding somehow prejudiced Jonathan leads nowhere. Although this Court has held that shackling a capital defendant during the guilt phase is *per se* error, *Deck v. Missouri*, 544 U.S. 622 (2005), the same is not true of the penalty phase, which is the only phase at issue here. The Kansas Supreme Court's reference to Reginald's

handcuffs somehow prejudicing Jonathan is even more bizarre given that the Kansas court did not rely on Reginald's visible handcuffs as a justification for granting severance *to Reginald*.

Reginald's deliberate refusal to do anything to conceal his handcuffs, JA 59, did not obviously or automatically prejudice Jonathan. Instead, just the opposite seems likely: seeing Reginald's handcuffs but not seeing any restraints on Jonathan might have suggested to the jury that Jonathan was better behaved than Reginald. In closing argument, Jonathan's counsel essentially made that point: "[Jonathan] has come to court every day, *unlike his brother*. And he has treated me like a gentleman. It's been my pleasure to represent him." JA 431 (emphasis added).

Ultimately, the Kansas Supreme Court failed to articulate any reason based in the law or logic, or to identify any facts in the record, to demonstrate compelling, specific, and actual prejudice to Jonathan. Denial of Jonathan's request for severance was not error, constitutional or otherwise.

2. Any Perceived Error Here Had To Be Harmless Given The Overwhelming Evidence Against Each Carr.

Even if the failure to sever the Carrs' sentencing proceedings somehow violated the Eighth Amendment, any error was harmless. The Kansas Supreme Court could arrive at a contrary conclusion only by ignoring and discounting the overwhelming evidence of the atrocities each Carr committed against multiple victims.

In order to conclude any error was harmless, this Court merely has to review the facts of the crimes. Reginald's purported confession (as hesitatingly and equivocatingly relayed by his sister, Temica), and Jonathan's meager attempts to claim Reginald was a negative influence on Jonathan, could not have made any difference in the jury's sentencing determinations given the overwhelming evidence. As the dissent below aptly summarized:

> For more than 3 hours, Reginald and Jonathan Carr inflicted their perverse form of torture on the five victims in this case, forcing their often naked captives to commit sexual acts on one another as the two intruders watched. Holly recounted that over those 3 hours she was raped once by Reginald Carr, who after raping her, grabbed her by the back, turned her around, ejaculated into her mouth, and directed her to swallow. The jury also heard Holly describe how she was twice raped by Jonathan Carr, forced to digitally penetrate herself, and forced into sexual intercourse with Heather, Brad, Aaron, and Jason.
>
> When she was not being violated herself, Holly sat naked in a closet with her fellow captives, so terrified she wet herself, listening to Heather moaning in pain as she repeatedly was raped in the same fashion. Heather's moans caused her boyfriend, Aaron, to break down, sobbing and crying, "[T]his shouldn't happen this way." Holly performed oral sex on Jason while in the closet because one of the two

defendants threatened additional violence if the men could not get an erection.

Each victim also was forced to leave the Birchwood residence and travel alone with Reginald Carr to withdraw money from his or her bank accounts. Holly recounted her experience, explaining she was clothed only in a sweatshirt, and that Reginald Carr groped her vagina while they were in the car. Holly asked Reginald if he was going to kill them, and he said "no."

But any slight hope Holly might have had that her life and the lives of her friends would be spared was dashed when they returned to the house and Reginald Carr told Holly, "[D]on't worry. I'm not going to shoot you *yet*." Carr's threat proved true when the five victims were taken at gunpoint into the garage, and Jason, Brad, and Aaron were forced into the trunk of Aaron's car. Jonathan Carr then drove Aaron's car, with Heather seated on the passenger side, while Reginald Carr drove Jason's truck with Holly seated on the passenger side.

The defendants then took their victims to a soccer field in a remote location. They ordered the men out of the trunk and ordered Heather and Holly out of the car. Eventually, Reginald Carr and Jonathan Carr forced each of their five victims, who were naked or partially clothed, to kneel next to each other, single file, on the snow-covered ground in below freezing temperatures. As these victims did so, surely each suspected his or her fate.

> Holly testified she heard one shot, then heard Aaron pleading, and then "another shot and another one and another one" as each victim was shot, execution style, in the back of the head. Then everything went briefly gray for Holly. But even after being shot in the back of the head, Holly remained kneeling. One of the defendants kicked her in the back, causing her to fall face forward in the snow. She heard the defendants having a conversation before they drove off in Jason's truck. She felt an impact as the truck ran over her.
>
> After the two men drove off, Holly got up and checked on the others, wrapping her only remaining piece of clothing around Jason's head in a futile attempt to save his life. And then she ran—terrified, naked, bleeding, and freezing for over a mile to get help. Meanwhile, Reginald and Jonathan Carr, unaware that Holly had survived, returned to the home at Birchwood to steal belongings from the victims and beat Holly's dog to death.

RC App. 494-496.

Kansas cannot sum up the situation better than the dissenting justice did when, after reviewing the preceding evidence, she concluded:

> The majority gives lip service to the standard of review.... But it entirely fails to conduct the analysis. Had it done so, I do not believe it could arrive at any conclusion other than that the severance error, if any, had little, if any, likelihood of changing the jury's ultimate

> conclusion. Instead, the court should hold that this jury, which demonstrated its willingness to independently assess the respective culpability of each defendant, appropriately conducted the required weighing of aggravating and mitigating circumstances and concluded Reginald Carr deserved the penalty of death.

RC App. 496-497.

Any error here, even assuming error can be found, was harmless by any standard the Court might apply.

II. There Was No Reasonable Likelihood That The Jury Applied The Instructions Here To Prevent The Consideration Of Mitigating Circumstances.

Relying on its decision in *State v. Gleason*, 329 P.3d 1102 (2014), the Kansas Supreme Court ruled that the trial court's failure to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt was constitutional error. RC App. 445-446. In *Gleason,* the court held that because "the instructions repeatedly emphasized the State's burden to prove the existence of aggravating circumstances beyond a reasonable doubt and to prove beyond a reasonable doubt that the death penalty should be imposed," but "never informed or explained to the jury that no particular burden of proof applied to mitigating circumstances," the Eighth Amendment was violated. 329 P.3d at 1148.

The Court explained its reasoning as follows:

> [the] jury was left to speculate as to the correct burden of proof for mitigating circumstances, and reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt. Thus, jurors may have been prevented from giving meaningful effect or a reasoned moral response to [the defendant's] mitigating evidence, implicating [the defendant's] right to individualized sentencing under the Eighth Amendment.

329 P.3d at 1148.

The relevant instructions in the *Carr* cases were virtually identical to those the Kansas Supreme Court found deficient in *Gleason*. Thus, the same legal arguments Kansas has made at length in its opening brief in *Kansas v. Gleason* are incorporated by reference.[13] Kansas here will only summarize those arguments and focus on facts and arguments specific to the *Carr* cases.

Nothing in this Court's precedents holds that the Eighth Amendment mandates an instruction affirmatively informing a capital sentencing jury that mitigating circumstances are *not* subject to any particular burden of proof. The Constitution only requires that capital sentencing juries be allowed to consider and give effect to all relevant mitigating evidence. *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990). So long as they do not prevent juries from

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[13] See Kansas Opening Brief in *Kansas v. Gleason*, at 23-42.

considering relevant mitigation, the States "are free to determine the manner in which a jury may consider mitigating evidence." *Kansas v. Marsh*, 548 U.S. 163, 171 (2006). Thus, to the extent the Kansas Supreme Court held that the Eighth Amendment requires a jury in a capital sentencing proceeding to be *affirmatively instructed* that mitigating circumstances need not be proven beyond a reasonable doubt, that ruling is erroneous.

Even if such an instruction were required as a matter of Kansas law, that circumstance would not establish an Eighth Amendment violation. Instead, the controlling constitutional standard is articulated in *Boyde v. California*, 494 U.S. 370 (1990): "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.*

The *Boyde* Court relied on three factors to decide whether the jury likely understood the instruction to prevent the consideration of mitigating evidence. *First*, the Court analyzed the language of the instructions and concluded that there was no reasonable likelihood that jurors would have read the challenged instruction to prevent consideration of any mitigating circumstances. *Id.* at 381-382. *Second*, the Court considered the actual evidence presented, pointing out that the defendant had offered considerable mitigating evidence with no opposition from the prosecution. *Id.* at 384. *Third*, the Court considered the arguments of counsel, and noted that the prosecutor never suggested that the mitigation evidence in question could not be considered. *Id.* at 385. Putting these considerations

together, the Court concluded that there was no reasonable likelihood the jury understood the instructions to prevent the consideration of relevant mitigating evidence.

Consideration of the three *Boyde* factors here leads to the inevitable conclusion that the jury instructions were constitutionally sound. As in *Gleason*, the jury was told that the "State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist." RC App. 501 (Instruction No. 4). Critically, the jury was told in detail that it had complete freedom to consider and assess mitigating circumstances:

> The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of this case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decisions.

RC App. 504 (Instruction No. 6).

The instructions on their face thus emphasize that jurors may consider virtually anything as mitigation, and that such circumstances are "to be determined by each individual juror." Nowhere do the instructions ever suggest that a burden of proof applies to mitigation. To the contrary, the fairest reading of them

is that determining and considering mitigation is within the unfettered discretion of each juror.

Indeed, there does not even have to be evidence *at all*, because the instruction also informed the jury that "[y]ou may further consider as a mitigating circumstance any other factor which you find may serve as a basis for imposing a sentence of less than death." RC App. 505. As a result, the instructions would permit a juror to vote for a life sentence even if virtually no mitigation evidence was presented, so long as the juror concluded that "any other factor" such as "mercy" or almost anything else outweighed any aggravating factors.

Moreover, at least three state supreme courts have reviewed virtually identical instructions and concluded that the most natural reading of such instructions is that there is *no* burden of proof for mitigation, not that the jury would be confused and think that a "beyond a reasonable doubt" standard applies. *People v. Welch*, 976 P.2d 754, 797 (Cal. 1999) ("because the trial court instructed specifically that the reasonable doubt standard applied (partially erroneously) to aggravating factors, and mentioned nothing about mitigating factors, the reasonable juror would infer that no such reasonable doubt standard applied to mitigating factors"); *Dawson v. State*, 637 A.2d 57, 64-65 (Del. 1994) ("in the absence of express guidance concerning the proper burden of proof to establish the existence of mitigating circumstances," court would *not* "assume that the jury applied the same 'beyond a reasonable doubt' standard of proof that it was instructed to use in determining whether the State had established the existence of statutory aggravating circumstances");

Matheney v. State, 688 N.E.2d 883, 902 (Ind. 1997) ("All instructions to a jury on reasonable doubt place that burden on the State," and thus "[t]here is no inference in any portion of a trial that defendant's evidence comes under that scrutiny.").

Second, in its argument to open the penalty phase, the State expressly told the jurors they had considerable discretion to consider mitigation, broadly defined: "mitigators" are "whatever they choose to prove or show to lessen or to change any culpability under the death penalty statute." JA 62. Indeed, the State made clear that "[a]nything, in fairness, may be considered as extenuating or reducing the degree of culpability or blame which justifies a sentence of less than death ...." JA 63-64.

Similarly, Jonathan's counsel told the jury that "[m]itigating evidence is what you decide it is. You decide how much mitigating evidence is worth." JA 68. And he emphasized the individualized nature of each juror's consideration: "what's important to one juror about mitigating might not be important to another." *Id.*

The State did not vigorously contest the existence of most of the mitigating circumstances presented. Apart from a battle of experts on the question whether either Carr presented actual scientific or medical evidence of demonstrable brain abnormalities, the State's argument focused almost entirely on the *weight* the jury should give the proposed mitigators. In fact, the State's case-in-chief in the penalty phase consisted entirely of resting on the evidence the State presented in the guilt phase. The State offered no new evidence or

witnesses to support its proof of aggravating factors. *See* JA 73-74.

The Carrs presented extensive evidence of their childhoods and how their lives paralleled risk factors the United States Department of Justice had identified in people who commit violent crimes. JA 408-409. This evidence included domestic violence in their home, alcohol and drug abuse by their parents, being abandoned, emotional detachment of their mother, family history of mental illness, and beatings they received when they misbehaved. JA 409-412, 415-417, 428, 430.

Reginald presented evidence of his early sexual conduct and drug dealing. JA 414. He further presented evidence that he tried to be a good father and that his children loved him. JA 418. And he emphasized that he would spend the rest of his life in prison if the jury chose to let him live. JA 420-421.

Jonathan presented evidence that he suffered when sent to another state to live with his aunt after he was accused of rape in the third grade. JA 427. He also presented evidence that he tried to commit suicide, perhaps twice, had a learning disability, and had no serious criminal record prior to these crimes. JA 428, 430. Jonathan also presented witnesses who remembered him as a good person growing up. JA 431-432. Finally, Jonathan reminded the jury that he would spend at least 50 years in prison if the jury spared his life. JA 432-433.

The only real point of contention regarding the evidence was the claim made by both Reginald and Jonathan that they had demonstrable brain

abnormalities. Their expert, Dr. Preston, a retired doctor who was qualified as an expert in "nuclear medicine," testified about PET scans, and how they can demonstrate the presence of brain abnormalities. His opinion was that the PET scan of each Carr done in preparation for this case showed abnormal brain functioning. JA 201, 203-204; Sentencing Tr. Vol. 42, at 6-105.

The State's only rebuttal witness in the penalty proceeding, and its only rebuttal evidence, was Dr. Pay, a neuroradiologist, who testified about PET scans and whether those of the Carrs in fact showed brain abnormalities. He disagreed with Dr. Preston's conclusions, testifying that he had consulted with a number of his colleagues and their consensus was the PET scans showed each Carr had a normal brain. JA 370-371; Sentencing Tr. Vol. 46, at 34-90.

Finally, the parties' closing arguments (the third *Boyde* factor), also made clear the jurors' responsibility to consider all of the mitigating evidence, broadly defined, and did nothing to give the impression mitigation could not be considered unless proven beyond a reasonable doubt. The State acknowledged that there had been "quite a bit of [mitigation] evidence." JA 392. The State reiterated that what counts as a mitigating circumstance is "[s]omething for the jury to decide." JA 396. The State certainly challenged the weight to be given mitigation evidence in comparison to the heinous nature of the crimes. *E.g.*, JA 398-399. But with the exception of the brain abnormality dispute, the State did not genuinely challenge the existence of the mitigating circumstances upon which either Carr relied. Rather, the State asked

the jury to consider whether anything either Carr presented reduced his "degree of moral culpability." JA 435. The State argued that the death penalty was appropriate for each Carr because the aggravating circumstances outweighed "any and all mitigation." JA 404-405, 434-436, 442-443.

Reginald's counsel emphasized that "[i]t is all for you to consider ... whether you want to give [any particular mitigating circumstance] any weight." JA 408. Likewise, Jonathan's counsel emphasized that "it is for you to decide how much impact a bad family life has." JA 426.

Applying *Boyde*, there is no reasonable likelihood the jurors applied the instructions in this case to prevent the consideration of any relevant mitigating evidence either Carr presented, or to prevent the jurors from giving whatever individual effect they chose to such evidence. Certainly, no reasonable juror would have understood these instructions to prevent consideration of mitigating circumstance unless such factors were proven beyond a reasonable doubt.

Ultimately, there is no basis in this Court's precedent, in logic, or in the record for the Kansas Supreme Court's Eighth Amendment rulings.

CONCLUSION

Kansas requests that the Court reverse the Kansas Supreme Court on both questions presented.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioner

June 2015

No. 14-449 SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR RESPONDENT JONATHAN D. CARR

JEFFREY T. GREEN
CLAYTON G. NORTHOUSE
KELLY A. ROSENCRANS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

SARAH ELLEN JOHNSON *
MERYL CARVER-ALLMOND
CAPITAL APPELLATE
DEFENDER OFFICE
700 Jackson, Suite 903
Topeka, KS 66603
sjohnson@sbids.org
(785) 368-6587

Counsel for Respondent

* *Counsel of Record*

August 17, 2015

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Jonathan Carr's constitutional right to a "reasoned, individualized sentencing determination based on [his] record, personal characteristics, and the circumstances of his crime," *Kansas* v. *Marsh*, 548 U.S. 163, 174 (2006), was violated when the trial court declined to sever the sentencing proceeding of his capital trial from that of his brother.

2. Whether jury instructions that repeatedly emphasize the jury's obligation to make findings as to both aggravating and mitigating circumstances, repeatedly instruct that the jury must "weigh" those circumstances, and repeatedly identify the evidentiary standard for aggravating circumstances as "beyond a reasonable doubt" while remaining wholly silent as to the defendant's burden of proof regarding mitigation evidence, are reasonably likely to confuse the jury and prompt it to disregard relevant mitigation evidence in violation of the Eighth Amendment.

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INTRODUCTION

The Carr brothers' crimes remain notorious in Kansas. The brothers were paired throughout trial and the judicial fate of one has been inextricably linked to the fate of the other. Their counsel strove to separate them at both the guilt phase and penalty phase of their capital trial, and for good reason in light of their opposing strategies. Jonathan Carr, the little brother, repeatedly tried to escape the prejudicial shadow cast by his big brother's actions and his demeanor before a jury deliberating between life and death.

This Court has set a high bar for accuracy and reliability in penalty phase proceedings. The Eighth Amendment requires juries to impose an individualized sentence and it further prohibits any substantial risk that the jury's decision to impose a death sentence rests upon improper considerations. Although the question of when trial courts must sever penalty phase proceedings is a novel one before this Court, it warrants a straightforward application of these same precedents that demand accuracy and reliability. Here, that high standard has been met: Jonathan Carr's penalty phase proceeding was indelibly and prejudicially affected by the State's constant association of Jonathan Carr with his brother.

The Kansas Supreme Court properly held that there was a substantial risk that the jurors could not reasonably make an individualized determination between life and death in the "maelstrom" of evidence about the brothers' culpability, history, and characteristics, especially where the prosecution seized every opportunity to paint the brothers with the same brush. The Kansas court's logic is sound: namely, that the prosecution's sweeping, collective presentation of the Carr brothers to the jury risked grave in-

accuracy where accurate and reliable individualized analysis is required.

STATEMENT OF THE CASE

Background

1. *The Guilt Phase.*

The Kansas Supreme Court concisely summarized the relevant background of the guilt phase of this capital case:

"[Reginald and Jonathan Carr] were jointly charged, tried, convicted, and sentenced for crimes committed in a series of three incidents in December 2000 in Wichita." Pet. App. 91.

"In the first incident on December 7 and 8, Andrew Schreiber was the victim. The State charged R. Carr and J. Carr with one count of . aggravated battery, and one count of criminal damage to property. The jury convicted R. Carr on all counts and acquitted J. Carr on all counts." Pet. App. 92.

"In the second incident on December 11, Linda Ann Walenta was the victim. The State charged R. Carr and J. Carr with one count of first-degree felony murder. The jury convicted both men." *Id.*

"In the third incident on December 14 and 15, Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims of an invasion at the men's Birchwood Drive home that led to sex crimes, kidnappings, robberies, and, eventually, murder and attempted murder." *Id.*

"The State charged R. Carr and J. Carr with eight alternative counts of capital murder, four based on a related sex crime under K.S.A. 21-3439(a)(4) and four based on multiple first-degree premeditated murders under K.S.A. 21-3439(a)(6); one count of attempted

first-degree murder; five counts of aggravated kidnapping; nine counts of aggravated robbery, eight of which were alternatives, four based on use of a dangerous weapon and four based on infliction of bodily harm; one count of aggravated burglary; 13 counts of rape, eight of which were based on coerced victim-on-victim sexual intercourse and one of which was based on a victim's coerced self-penetration; three counts of aggravated criminal sodomy, two of which were based on coerced victim-on-victim oral sex; seven counts of attempted rape, six of which were based on coerced victim-on-victim overt acts toward the perpetration of sexual intercourse; one count of burglary; and one count of theft. The State also charged R. Carr and J. Carr with one count of cruelty to animals because of the killing of Holly G.'s dog. The jury convicted R. Carr and J. Carr on all of the charges arising out of the Birchwood incident." Pet. App. 92-93.

Motions to Sever at the Guilt Phase. Jonathan and Reginald Carr each moved to sever his trial from that of his brother multiple times before and during the trial. See Pet. App. 36, 188-209. The primary ground for these motions was that the defendants would present "antagonistic defenses." *Id.* at 189, 191-92. Initially, in a pretrial proceeding, "[t]he prosecutor recognized the danger for prejudice in a joint trial and suggested that two juries could be impaneled." *Id.* at 192. Later, the prosecutor "repeated her proposal but said she was not advocating for severance." *Id.* at 193. The trial court denied the motion with leave to refile. *Id.*

The motion to sever was renewed on several occasions during the trial and each time denied. Pet. App. 197. For example, Jonathan Carr's counsel renewed the severance motion when the trial judge ordered that Reginald Carr wear "leg and hand re-

straints in the courtroom during the guilt phase of the trial." *Id.* at 199. Counsel "argued that R. Carr's misconduct would prejudice his client." *Id.* See also *id.* (Jonathan Carr's counsel states that the trial judge is "probably tired of hearing it, but Reginald Carr continues to infect our right to a fair trial."). The judge took steps to shield Reginald Carr's shackles from the jury, but did not otherwise rule on the severance motion. *Id.* at 200.

On appeal, the Kansas Supreme Court found that "there is no question that the defendants had antagonistic defenses, and the State concedes this point." Pet. App. 205.

> R. Carr argued that J. Carr committed the Birchwood crimes with another person. J. Carr's counsel emphasized the relative weakness of the evidence against his client in the Schreiber and Walenta incidents and consistently stressed the evidence of R. Carr's guilt in the Birchwood incident. Each defendant did his best to deflect attention from himself on the Birchwood crimes by assisting in the prosecution of the other.

Id. But, the court nonetheless declined to hold that the trial court's abuse of discretion resulted in prejudice requiring reversal. *Id.* at 213. The court found that the State's "independent case against R. Carr was overwhelming," detailing the evidence against him. *Id.* at 211. Thus, the court concluded that "the State presented compelling evidence of R. Carr's guilt, all of which would have been admissible in a severed trial." *Id.* at 213.

In its separate opinion addressing Jonathan Carr's challenge to the denial of severance, the court stated that the majority "agrees that any error on this issue was not reversible standing alone for [the] reasons

explained in the R. Carr appeal." Pet. App. 28. Although the court did a substantial analysis of why the denial of the motion to sever had not prejudiced Reginald Carr, *id.* at 209-13, it did not separately explain why Jonathan Carr did not suffer prejudice, *id.* at 28.

2. *The Penalty Phase.*

Both defendants unsuccessfully renewed their motions to sever after their capital convictions and before the penalty phase of the trial. Pet. App. 472.

Shackling. At the beginning of the penalty phase, the trial judge indicated that standard procedure required the shackling of convicted capital defendants. The judge explained that while "there's been nothing that would indicate misconduct on behalf of Mr. Jonathan Carr at all in any of the proceedings [that he had been] involved in [t]he sheriff's procedures, [regarding security] ought to be followed." J.A. 57 (Tr. Vol. 41A at 5). The judge took measures to ensure that the jury could not observe Jonathan Carr's shackles. *Id.* at 57-59 (Tr. Vol. 41A at 6-7).

Reginald Carr, however, refused to conceal his shackles. *Id.* at 59 (Tr. Vol. 41A at 7) ("Mr. Greeno, I understand your client will not put the sweater over his handcuffs."). The judge stated that if the jury sees the shackles, Reginald Carr had "invited it," referring to the prejudice flowing from visible shackling. *Id.* See also *id.* ("it's made known to the jury, he's the one that broadcast it, then"). There was no discussion of the effect of Reginald Carr's visible shackling on the jury's perception of Jonathan Carr, who wished to continue to conceal his shackles from the jury.

The State's Case for Death. For each brother, the State asserted the same four aggravating factors in

support of the death penalty. The State charged that the brothers (i) "knowingly or purposely killed or created a great risk of death to more than one person," (ii) "committed the crime[s] for their own self or for another for the purpose of receiving money or any other thing of monetary value," (iii) "committed the crime[s] in order to avoid or prevent lawful arrest or prosecution," and (iv) "committed the crime[s] in an especially heinous, cruel and atrocious manner." *Id.* at 49 (Tr. Vol. 40 at 33). As support, the State put into evidence the guilt phase trial record in full. *Id.* at 73-74 (Tr. Vol. 41A at 35).

As described in detail *infra* at 26-30, the theme of the State's penalty phase presentation was that Jonathan and Reginald Carr were a single entity, equally culpable for the horrific crimes that were committed, equally sociopathic and dangerous by virtue of their genetics and upbringing, and equally deserving of the death penalty. The State's opening argument focused on the "heinous ideas and depraved conduct of Jonathan and Reginald Carr together. Together." J.A. 66 (Tr. Vol. 41A at 16). And the State's closing linked Reginald Carr's sociopathy and future dangerousness to Jonathan Carr:

> Dr. Woltersdorf indicated that after giving psychological testing to Reginald Carr, that he was an antisocial personality, otherwise known commonly as a sociopath, opportunistic, self-indulgent. That is who you are sitting in judgment of, uncaring individuals. They beg you today for sympathy. They do. They are begging one of you, just one, because that's all they need.
>
> They want to get that sympathy by suggesting that their excuse is to deflect the responsibility. They want to beg you for sympathy because of that rough childhood.

Id. at 437 (Tr. Vol. 46 at 186-87).

Mitigation Evidence. The brothers each presented mitigation cases. In both, defense witnesses testified about the defendants' "dysfunctional upbringing and their psychological profiles." Pet. App. 448.

The defendants' mother, Janice Harding, testified that she and their father, Reginald, Sr., were 16 and 17 years old when their first child, Temica, was born. When Janice turned 18, she and Reginald were married, and they had three more children, Reginald, Regina and Jonathan. All were born prematurely. *Id.* The brothers were "always real close," and Jonathan "looked up to" Reginald. *Id.*

Regina died of cancer before she was three, and Janice testified that "the family deteriorated" after Regina fell ill. *Id.* Janice "fell out" with her mother-in-law after the latter reported to child protective services that she saw bruises on Regina's legs, arms and chest. *Id.* at 448-49. After Regina's death, Janice and Reginald, Sr. began "drinking heavily and fighting." *Id.* "Temica testified that she saw her father beat her mother with a stick." *Id.* In addition, Janice regularly disappeared for several days, sometimes leaving her children alone in the house. *Id.*

Janice and Reginald, Sr. separated when Reginald was 5 or 6 and divorced shortly thereafter. Reginald, Sr. lost all meaningful contact with the children. *Id.* at 450. And after the divorce, Janice "was not available to her children." *Id.* at 451. She was either absent from the home or "hol[ed] up" in her bedroom with her future husband. *Id.* Periodically, the children were shipped off to live with relatives and did not see their mother for months at a time. *Id.*

During their childhood, Janice physically disciplined her children. They "described that their moth-

er's whippings with a belt or extension cord would leave them with welts, bruises and blood blisters on their backs, legs or buttocks." *Id.* at 453. The children were required to hold each other down for punishment. *Id.*

In addition, Janice testified that she and Reginald, Sr. used marijuana and cocaine. The children were aware of their parents' excessive alcohol use and their drug use. *Id.* at 454. The parents and other relatives gave alcohol to the children early: Jonathan had Thunderbird wine mixed with Kool-Aid at age 8. The boys would drink with their uncle weekly and "get drunk." *Id.* at 455. Jonathan Carr "first smoked marijuana at age 13 with" Reginald Carr. *Id.* "They would smoke blunts, cigar-like rolls of marijuana, 'every day, all day.'" *Id.* Jonathan also described "smoking 'wet'—tobacco or marijuana cigarettes dipped in a mixture of PCP 'and typically embalming fluid'—at age 19." *Id.* Reginald Carr was selling drugs by age 13, and drinking heavily by age 16 (when Janice kicked him out of the house). *Id.*

Both Jonathan and Reginald Carr suffered childhood sexual abuse. There was testimony that both "were forced to have oral sex with [their] mother's boyfriends." *Id.* at 456. Temica thought at least Reginald was aware that her father had sexually abused her. *Id.* Jonathan Carr began having sexual contact at around age 6 or 7. *Id.* Both boys had sexual contact with a cousin starting when she was 7 and Reginald was 9. *Id.* at 457.

Jonathan Carr had difficulty in school; among other issues he was dyslexic. *Id.* at 463. While in school, he would try to disguise his inability to read. *Id.* When Jonathan Carr was in third grade, a girl accused several boys, including Jonathan, of raping her. Jonathan's name was mentioned in the newspaper,

and he was bullied as a result. *Id.* at 457. Thereafter he was sent to live with his aunt. *Id.* at 458. He became so despondent that "he tried to hang himself." *Id.* This was not Jonathan Carr's only suicide attempt. At age 17, he again attempted to kill himself by drinking antifreeze, after a dog he was fond of died by doing so. *Id.* Jonathan Carr dropped out of school in tenth or eleventh grade. *Id.* at 463.

Both defendants were evaluated by medical professionals. Reginald Carr was evaluated by Dr. Mitchel Woltersdorf who diagnosed him with "brain damage." *Id.* at 460. He assessed that Reginald had suffered "significant head trauma or traumas, most likely during the first 8 or 9 years of his life." *Id.* at 461. "He found that he suffered from depression, antisocial personality disorder, distrust and paranoia." *Id.* The doctor indicated that "[t]he antisocial personality disorder also showed up in problems with anger management and difficulties with authority." *Id.* at 461.

Dr. Woltersdorf also testified that, with respect to Reginald's "anti-social personality disorder, ... there is no successful treatment protocol, and he had no disagreement with clinical profiles characterizing R[eginald] Carr as a 'self-centered and poorly socialized'" individual, 'primarily concerned with instant gratification of his immediate wants and needs.'" *Id.* at 473. See also J.A. 300-01 (Tr. Vol. 44 at 41-42) ("antisocial personality is the kind of person who's against authority...[t]here is no treatment for a personality disorder. It's something that he was given, so to speak, in life, somewhere between birth and the fifth year of life."); *id.* at 307 (Tr. Vol 44 at 48-49) ("personality disorder, you cannot treat it. I mean a person was made this way in the first five years of life, usually by a family situation.").

Reginald was also evaluated by Dr. Reidy, a forensic psychologist. He "echoed Woltersdorf's statement that family circumstances are usually the cause of the development of an antisocial personality disorder, noting that families are the strongest socializing force in life, and 'deviance begins at home.'" Pet. App. at 462. Dr. Reidy cited the parental abandonment and neglect, the family history of mental illness, the inappropriate early sexual exposure, the early violent behavior, and the emotional and physical abuse, concluding that Reginald Carr's "developmental trauma was severe and that protective factors were minimal to nonexistent." *Id.* at 463.

Mark Cunningham, a clinical and forensic psychologist, evaluated Jonathan Carr. *Id.* He testified that Jonathan was "emotionally disturbed from early childhood" and he "identified the family situation—involving physical and sexual abuse, parental neglect, and emotional detachment—and a genetic predisposition to mental illness and substance abuse" as the source of Jonathan's "emotional instability." *Id.* at 464. Moreover, he described "[w]hat we call sequential damage that's going from generation to generation to generation. In this family system, there is generational family disorganization, abandonment and negectful parenting." Tr. Vol. 45A at 115.

In all, Dr. Cunningham testified that, "[u]sing a . Department of Justice study of risk factors that increase the likelihood of involvement in criminal violence . Jonathan Carr exhibited 18 or 19 out of approximately 22 factors." Pet. App. 466. As he summarized: Jonathan Carr's violent crimes were the result of "'some very problematic genetic predispositions' in addition to 'neurological abnormalities,' 'a catastrophic family setting' leading to 'substance

abuse and disturbed adjustment that are aggravating each other during adolescence.'" *Id.* "Out of that, you have the influence of his older brother and intoxication at the time. And from that, you have the capital offense." *Id.*

Jonathan Carr's counsel sought to distinguish Jonathan from his older brother in several ways, to wit, his "lack of a serious criminal record prior to these offenses," J.A. 430 (Tr. Vol. 46 at 178), his relative youth, *id.* at 430-31 (Tr. Vol. 46 at 178), and his attendance and his demeanor at trial, *id.* at 431 (Tr. Vol. 46 at 178-79).

Instructions. At the end of the penalty phase but *before* closing arguments, the jury was instructed. The court gave identical instructions on aggravating and mitigating circumstances for both defendants. *Id.* at 380-83 (Tr. Vol. 46 at 115-19) (Reginald), *id.* at 383-86 (Tr. Vol. 46 at 119-122) (Jonathan).[1]

During the penalty phase, the court did *not* periodically instruct the jury that it was required to give individualized consideration to each defendant. The jury did, however, receive a single instruction about the requirement that it consider each defendant's death sentence individually:

> You must give separate consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him. Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant.

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[1] The jury instructions here are unconstitutional for the reasons explained in the respondent's briefs in *Kansas* v. *Gleason*, No. 14-452 (filed Aug. 3, 2015), and in *Kansas* v. *Reginald Carr*, No. 14-450 (filed Aug. 3, 2015), discussed and incorporated by reference here, *see infra* at 44-46.

J.A. 379-80 (Tr. Vol. 46 at 114-15).

As noted, the jury was never instructed to disregard Reginald Carr's shackling in its consideration of Jonathan Carr's sentence. The State's and defendants' closing arguments followed the instructions to the jury.

Capital Verdict. The jury unanimously found all aggravating circumstances with respect to both defendants. It also unanimously concluded that the aggravating factors outweighed any mitigating factors and returned death sentences for both defendants. The trial court imposed those sentences. Pet. App. 93.

3. *The Decision of the Kansas Supreme Court.*

The Supreme Court of Kansas affirmed one capital conviction for each defendant, but ordered that the death sentences be vacated and a new penalty trial be held. The court recognized that there is no "categorical[] mandate" that the penalty phase of capital proceedings be severed, Pet. App. 472, but concluded that, in the specific circumstances presented here, the defendants' Eighth Amendment rights to an individualized determination of their death sentences were violated by the trial court's refusal to sever the penalty phase proceedings. *Id.* at 45, 50, 530.

In Jonathan Carr's case, the court relied on the "reasons explained in" the opinion addressing Reginald Carr's penalty phase severance claim and "the family circumstances argument raised by J. Carr." Pet. App. 45. The court also cited Jonathan Carr's argument that "the joint trial inhibited the jury's individualized consideration of him because of family characteristics tending to demonstrate future dangerousness that he shared with his brother." *Id.* at 471. The court further "relie[d] on the prejudice to J.

Carr flowing from R. Carr's visible handcuffs during the penalty phase." *Id.* at 45 (relying, *inter alia*, on *Deck* v. *Missouri*, 544 U.S. 622, 624 (2005)).

The court found that Jonathan Carr's mitigation case—which sought to differentiate his moral culpability from that of his brother—was antagonistic to Reginald Carr. Pet. App. 473-75. The court pointed to the fact that Jonathan Carr's counsel elicited testimony from the brothers' sister (Temica) that Reginald had informed her, in a conversation from jail, that he fired all of the fatal shots in the execution-style Birchwood Drive murders. *Id.* at 475-76. Finally, the court noted that Jonathan Carr's mitigation evidence "was prone to being used as improper, nonstatutory aggravating evidence against [Reginald Carr]." *Id.* at 477.

The court acknowledged that the jury was instructed that the "evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant." Pet. App. 477. The court found, however, that "this is a rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic." *Id.* In particular, the court relied on "the defendants' joint upbringing in the maelstrom that was their family and their influence on and interactions with one another," and concluded that "the penalty phase evidence simply was not amenable to orderly separation and analysis." *Id.*

Finally, the Kansas Supreme Court found that the error was not harmless. Pet. App. 478-79. The court held that "[t]he test is not whether a death penalty sentence would have been imposed but for the error; instead the inquiry is whether the death verdict actually rendered in this trial was surely unattributable to the error." *Id.* at 479 (citation omit-

ted). The court found that "[t]he evidence that was admitted, the especially damning subset of it that may not have been admitted in a severed proceeding, and the hopelessly tangled interrelationship of the mitigation cases presented by the defendants persuades us that the jury could not have discharged its duty to consider only the evidence limited to one defendant as it arrived at their death sentences." *Id.* The death sentences were, accordingly, vacated and remanded for penalty phase proceedings to be held before different juries. *Id.* at 478-80.

Justice Moritz dissented. She focused her disagreement on the majority's holding that Reginald Carr was deprived of an individualized sentencing determination because Jonathan Carr's mitigation case was adverse to him. Pet. App. 555. She also believed that the court had erred by failing to adhere to the presumption that jurors can follow the judge's instructions. *Id.* at 556. And, she disagreed with the court's conclusion that the erroneous failure to sever the penalty phase proceedings was not harmless error. *Id.* at 557-58.

SUMMARY OF ARGUMENT

While joint trials in non-capital cases can serve important interests, including efficiency and saving resources, see *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993); *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987), this Court has explained that joint proceedings are not permitted—even in lower-stakes, non-capital cases—where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. See also *Kansas* v. *Marsh*, 548 U.S. 163, 174 (2006) (the constitution requires,

particularly in capital cases, that all defendants receive a "reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.")

The Court has not addressed the standard for assessing when severance is required at the penalty phase of a capital case. However, given accuracy and reliability concerns surrounding the life and death decisions of penalty phase juries, an appropriate standard would call for severance when there exists *any reasonable risk* that the jury may impute material prejudicial evidence against one defendant, where that evidence would be inadmissible or otherwise absent in a separate penalty phase proceeding against the disadvantaged defendant. At the very least, penalty phase proceedings in a capital case must be severed if joint proceedings would violate the standard set in *Zafiro*, a non-capital standard which calls for a "serious risk" of prejudice from evidence that would be inadmissible in a separate trial.

Here, the joint penalty phase proceedings satisfied even the *Zafiro* "serious risk" standard. That is because, first, Reginald Carr chose not to conceal his shackles from the jury during the penalty phase of this case. "[T]he offender's appearance in shackles almost inevitably implies to a jury that court authorities consider him a danger to the community," and "almost inevitably affects adversely the jury's perception of the defendant's character," and thus undermines the jury's ability to weigh all relevant considerations in determining whether he deserves death. *Deck*, 544 U.S. at 622-23. Reginald Carr's choice thus undermined the jury's ability to weigh all relevant considerations in determining whether Jonathan Carr deserved death. The judge warned Reginald

Carr that he was waiving any claim based on resulting prejudice. But the judge ignored the spillover prejudice and dangerousness by association that Reginald Carr's visible shackles created for Jonathan Carr in the context of this case, and he did not give any instruction that might have mitigated that harm.

Moreover, the prejudice flowing to Jonathan Carr from Reginald Carr's shackling was compounded by (i) the testimony of Reginald Carr's own expert to the jury that he was a dangerous, incurable sociopath as a result of his genetics and upbringing, and (ii) the prosecutor's focus on the fact that Reginald and Jonathan Carr are brothers who share the same DNA and the same upbringing, and thus deserve the same fate. It is unreasonable to conclude that none of the jurors imputed to Jonathan Carr the evident dangerousness and sociopathy of his brother.

Not only were Jonathan Carr's constitutional rights violated by the admission of evidence and acts solely attributable to Reginald Carr, but the jury also could not adequately and fairly consider Jonathan Carr's mitigating evidence—*e.g.*, the evidence of a family history of mental illness and childhood sexual abuse and neglect. Jonathan Carr's mitigating evidence was irrevocably tainted by the prosecutor's repeated tethering of him to his dangerous, sociopathic brother.

The single jury instruction observing that the Carr brothers should receive individual consideration could not cure this prejudice. Among other reasons, the jury was *never* instructed to avoid drawing inferences about Jonathan Carr's future dangerousness from Reginald Carr's shackling. Under the particular circumstances here, there was a strong "likelihood that the [given] instruction [would] be disregarded," with devastating effect, as was foreseeable based on

events during the trial and before the sentencing proceeding began. *Cruz* v. *New York*, 481 U.S. 186, 193 (1987). In any event, the State relies on an instruction that came *before* the prosecution's closing argument, which urged the jury to treat the defendants as equally culpable and used Reginald Carr's sociopathy in arguing that *both defendants* should be sentenced to death.

Finally, this error cannot be deemed harmless. In evaluating errors such as the ones at issue here, the question is not "whether the legally admitted evidence was sufficient to support the death sentence but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite* v. *Texas*, 486 U.S. 249, 258-59 (1988) (citation omitted). The specific question here, then, is whether evidence of Reginald Carr's dangerous, incurable sociopathy and/or the jury's inability to consider Jonathan Carr's mitigation evidence contributed to the jury's decision not to grant mercy. The Kansas Supreme Court's decision that Jonathan Carr's sentence should be vacated and that his case should be remanded for resentencing should be affirmed.

ARGUMENT

I. FAILURE TO SEVER AT THE PENALTY PHASE DEPRIVED JONATHAN CARR OF A REASONED, INDIVIDUALIZED DETERMINATION OF HIS DEATH SENTENCE.

Jonathan Carr's sentencing abridged his right to an individualized determination in two important ways: first, the jury considered extraneous, prejudicial evidence, *e.g.*, *Romano* v. *Oklahoma*, 512 U.S. 1, 12 (1994) ("[t]he relevant question . is whether the

admission of [irrelevant] evidence . so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process."); second, the sentencing proceedings abrogated Jonathan Carr's ability to submit, and to have the jury consider, mitigation evidence, *e.g.*, *Marsh*, 548 U.S. at 174 ("the sentencer must have full access to . highly relevant' information" surrounding mitigating circumstances.) (citations omitted).

First, a jury cannot consider evidence about one defendant in deciding either the guilt or the sentence of a second defendant. *Zafiro*, 506 U.S. at 539. See *id.* (prejudice "might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant."); *id.* (noting approvingly that a trial court would likely sever a case "[w]hen the risk of [such] prejudice is high").

In analogous circumstances, this Court has made clear that "the death sentence must be set aside" where, as a result of legal error, the jury has been allowed to hear and consider evidence "that would not otherwise have been before it." *Brown* v. *Saunders*, 546 U.S. 212, 219 (2006) (describing *Zant* v. *Stephens*, 462 U.S. 862, 886 (1983)). See also *Zant*, 462 U.S. at 885 (explaining that the jury may not consider evidence that is "constitutionally impermissible or totally irrelevant to the sentencing process" in capital cases). Cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974) (the issue is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process.").[2] That is because "when the sentencing body

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[2] The United States suggests that "the individualized-consideration requirement [is] an *inclusionary* principle, not an *exclusionary* one," U.S. Br. 24 n.8, but this Court has not sliced

is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer* v. *Black*, 503 U.S. 222, 232 (1992).

Here, the jury both saw and heard at least two critical pieces of evidence in the penalty phase that were unique to Reginald Carr, but were urged upon the jury as evidence against Jonathan Carr; namely (1) Reginald Carr's insolent display of his shackles to the jury; and (2) expert testimony, unique to Reginald Carr, of his incurable sociopathy.

Second, "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007). See also *McCleskey* v. *Kemp*, 481 U.S. 279, 306 (1987) ("[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty."). The Eighth Amendment "require[s] that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Marsh*, 548 U.S. at 174 (quoting *Lockett*, 438 U.S. 586, 603 (1978)) (alteration in original).

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the requirement so finely. A jury's consideration of prejudicial evidence in sentencing one defendant that is relevant only to his co-defendant violates the former's right to individualized consideration just as thoroughly as a jury's failure to consider relevant mitigating evidence. That error generally will also be a due process violation as the United States explains. *Id.*

The State's penalty phase presentation, in combination with Reginald Carr's penalty phase decisions and strategy, effectively precluded the jury from giving "meaningful consideration and effect" to Jonathan Carr's mitigation case, and violated his right to an individualized determination that he deserved death. See *Lockett*, 438 U.S. at 604 ("the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (footnote omitted); *Eddings* v. *Oklahoma*, 455 U.S. 104, 113 (1982) (holding that "limitations placed by [the Oklahoma] courts upon the mitigating evidence they would consider violated" the rule established in *Lockett*). See also *Abdul-Kabir*, 550 U.S. at 246 ("sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual."); *McCleskey*, 481 U.S. at 306 ("[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty."). The Eighth Amendment "require[s] that the sentencer not be precluded from considering, as a *mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Marsh*, 548 U.S. at 174 (quoting *Lockett*, 438 U.S. at 603).

A. The Jury Improperly Considered Evidence Relating To Reginald Carr In Deciding Whether Jonathan Carr Deserved Death.

1. Reginald Carr's Decision To Display His Shackles.

This Court has expressly held that shackling a defendant in the courtroom "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point." *Deck*, 544 U.S. at 633. And, at joint proceedings, the co-defendants of that shackled defendant may suffer "guilt by association" when tried simultaneously with that shackled defendant. See, *e.g.*, *United States* v. *Jarvis*, 792 F.2d 767, 768 (9th Cir. 1986). The jury is particularly likely to impute the shackled defendant's dangerousness to a co-defendant where, as here, the defendants are brothers, and the prosecution's theme that they are linked by genetics, their upbringing, their joint choices and their joint crimes recurs throughout trial. Moreover, the trial court gave no instruction to the jury that the jurors should *not* consider Reginald Carr's shackles in assessing whether Jonathan Carr presents a danger to the community. In light of the close association between the brothers and co-defendants, Reginald Carr's brazen display of his shackles to the jury after his conviction—and his willingness to have the jury perceive him as so dangerous to the community that he had to be chained—prejudiced Jonathan Carr, who thus failed to receive an individualized consideration of his death sentence.

Shackles are a physical manifestation and persistent reminder of the state's conclusion that it "need[s]

to separate a defendant" who is uniquely dangerous from the rest of the community. *Deck*, 544 U.S. at 630 (internal quotation marks omitted) (citation omitted). Visible shackles also compromise the "dignified" judicial process which requires "respectful treatment of defendants [and] reflects the importance of the matter at issue." *Id.* at 631. See also *id.* (citing "the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment"). See also *Estelle* v. *Williams*, 425 U.S. 501, 505 (1976) (trying a defendant in prison clothes creates a "continuing influence throughout the trial," and an "unacceptable risk" that the jury will consider "impermissible factors," and thus is unconstitutional.); *Illinois* v. *Allen*, 397 U.S. 337, 344 (1970) ("the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant ").

The prejudicial effect of shackling is so evident that this Court has concluded that shackles are the "least acceptable" method to deal with a disruptive defendant. *Id* at 350. Prevention of such prejudice is particularly critical in a capital case, where there is an "'acute need' for reliable decisionmaking." *Deck*, 544 U.S. at 632 (citation omitted). Thus, visibly shackling a defendant before a jury is unconstitutional unless it is "justified by a state interest *specific* to a *particular* trial." *Id.* at 629 (emphasis added).

In certain joint trials and proceedings, the unconstitutional prejudice that follows from the shackling of one defendant flows by association to his co-defendant. The question whether a co-defendant has suffered that guilt by association—here, dangerousness by association—is a "case specific" inquiry into "particular concerns related to the defendant on trial." *Id.* at 633. In many cases, juries are likely to

assume a defendant's guilt or dangerousness by association when jointly tried with a shackled co-defendant. See, *e.g.*, *Jarvis*, 792 F.2d at 768 (jury's sighting of shackled co-defendants jeopardized the absent defendant's right to a fair trial because "jurors would infer his 'guilt by association' with the other shackled defendants"); *id.* ("what the jurors saw would have a detrimental effect on the rights of all of the defendants to be presumed innocent of all charges."); *Reynolds* v. *Gomez*, No. 97-16126, 1998 WL 869908 (9th Cir. Dec. 14, 1998) (unpublished) (following *Jarvis*); *United States* v. *Mannie*, 509 F.3d 851, 857 (7th Cir. 2007) (co-defendant's prison garb creates "an impermissible risk that some jurors voted to convict based on the perception that [the co-defendant in civilian clothes] was a violent gangster who needed to be incarcerated for the safety of the community").

Here, the State packaged the brothers as a single unit throughout the trial and penalty phase in this capital case, arguing that they were equally responsible for all aspects of the violent crimes committed and thereby deserved to share a single fate. This merging of the brothers' guilt and responsibility is exemplified by the prosecution's closing argument in the penalty phase: "[t]hese defendants share a lot of things in common a common family history some DNA . intelligence . choices." J.A. 402 (Tr. Vol. 46 at 142). This was followed by the State's observation that Reginald Carr is a "sociopath" as a result of his genetics and upbringing, and then an express linkage of Reginald Carr's sociopathic nature to Jonathan Carr who, of course, shares the same genetics and upbringing:

> [Reginald Carr is] an antisocial personality, otherwise known commonly as a sociopath, oppor-

> tunistic, self-indulgent. That is who you are sitting in judgment of, uncaring *individuals*. *They* beg you today for sympathy. *They* do. *They* are begging one of you, just one, because that's all *they* need."

Id. at 437 (Tr. Vol. 46 at 186-87) (emphasis added).

In these circumstances, Reginald Carr's decision to display his shackles and invite the jury to see him as dangerous would result ineluctably in the jury viewing Jonathan Carr as dangerous by association. See, *e.g.*, *Mannie*, 509 F.3d at 857 (prejudice by association was likely because "the government's theory of the case was that [both co-defendants] were dangerous members of a street gang.") (footnote omitted); *Reynolds*, 1998 WL 869908, at *1 (where the unshackled defendant drove the robbery getaway car for the shackled defendant, the evidence was "inexorably intertwined" such that the shackles created a "substantial and injurious effect or influence in determining the jury's verdict" against the unshackled defendant) (citation omitted).

The Court has held that when a defendant appears before a jury in shackles, the prejudice is so great that "the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck*, 544 U.S. at 635. The trial judge here acknowledged the prejudicial effect the visible shackles would have on Reginald Carr in the penalty phase, saying "if the jury sees [the restraints], then the defendant has invited it." J.A. 59 (Tr. Vol. 41A at 7). But that same judge simply ignored or neglected the effects that Reginald Carr's visible shackling would have on the jury's perception that Jonathan Carr is dangerous to the community, putting a "thumb on the scale" for a sentence of death. See *Deck*, 544 U.S. at 633. And no instruction informed the jury that it should disregard

Reginald Carr's decision to display his shackles when considering whether to impose a death sentence on Jonathan Carr. See *Commonwealth* v. *Cruz*, 311 A.2d 691, 692 (Pa. Super. Ct. 1973) ("it is of the essence that [the judge] instruct the jury in the clearest and most emphatic terms that it give such restraint no consideration whatever in assessing the proofs and determining guilt."); *Broadus* v. *State*, 487 N.E.2d 1298, 1305 (Ind. 1986) (admonishing the jury to disregard the shackles in determining the defendant's circumstances where the defendant displayed his shackles to the jury).

Neither the State nor the United States makes any serious attempt to address the prejudice to Jonathan Carr arising from his brother's visible shackles. Ignoring the wall of authority highlighting the patent prejudice from this practice, see *supra* at 21-24, the United States relegates its discussion of this prejudice to a footnote, speculating that Reginald Carr's shackles may have "suggest[ed] that authorities did not regard the unshackled defendant as a danger." U.S. Br. 31 n.10. The State, too, suggests that Reginald Carr's shackles should have indicated that Jonathan Carr was better behaved than his brother. Pet'r Br. 49. But if that were true, then there would be no need for the many courts that have discussed spillover associational prejudice to have done so. Regardless, these speculative conclusions are particularly inapt here, where the State's presentations at both the guilt and penalty phases characterized the brothers as a unit whose birth, family, and crimes should result in the same verdict and the same punishment.

The State (but not the United States) asserts that this Court's analysis in *Deck* applies only to the guilt phase of criminal trials. Pet'r Br. 48. In fact, *Deck* explicitly considers shackling during the punishment

phase of a capital case. See 544 U.S. at 630. This Court reasoned that the decision between life and death in the sentencing phase "is no less important than the decision about guilt," and so the "considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases." *Id.* at 632.

2. Reginald Carr's Sociopathy And Dangerousness Were Attributed To His Genetics And Upbringing, And Thus Both Were Unconstitutionally Imputed To Jonathan.

Not only did Reginald Carr's visible shackling render Jonathan Carr's penalty phase trial unconstitutional, but the State wrongly argued that that Reginald and Jonathan Carr are a unit, identically culpable for the events that occurred. And, based on the brothers' shared genetics, family background and upbringing, the State leveraged evidence about Reginald Carr's dangerousness and incurable sociopathy to ensure that Jonathan Carr, too, would receive the death sentence.

Specifically, the State submitted the same aggravating circumstances in support of the death penalty for both Reginald and Jonathan Carr. It also submitted the full record of the guilt phase as evidence of aggravating circumstances against both, and chose to present nothing further. Accordingly, the State's penalty phase presentation was limited to its opening, its cross-examination of Reginald and Jonathan Carr's witnesses, and its closing argument. Throughout the penalty phase, the State's theme was that the Carr brothers should be considered as one.

The State's opening argument in the penalty phase focused on the "heinous ideas and depraved conduct of Jonathan and Reginald Carr together. Together." J.A. 66 (Tr. Vol. 41A at 16). The State expressly stated that "Their participation was equal." *Id.* at 436 (Tr. Vol. 46 at 185). See also *id.* at 395 (Tr. Vol. 46 at 133) ("it was not in Jonathan and Reginald Carr's best interest to leave individuals alive to tell the story that might cause them to have responsibility for the already heinous and atrocious acts that they had committed before the killings.").

The State several times noted that the brothers share genetic material, "shar[e] DNA." *Id.* at 399 (Tr. Vol. 46 at 137). See *id.* at 402 (Tr. Vol. 46 at 142) ("[t]hey share some DNA."). And, as described above, the State's closing argument highlighted Reginald Carr's sociopathy and incurable future dangerousness and sought to link him and these qualities—through genetics and family circumstances—to Jonathan Carr:

> Dr. Woltersdorf indicated that after giving psychological testing to Reginald Carr, that he was an *antisocial personality, otherwise known commonly as a sociopath, opportunistic, self-indulgent.* That is who you are sitting in judgment of, *uncaring individuals.* They beg you today for sympathy. They do. They are begging one of you, just one, because that's all they need.
>
> They want to get that sympathy by suggesting that their excuse is to deflect the responsibility. They want to beg you for sympathy because of that rough childhood.

Id. at 437 (Tr. Vol. 46 at 186-87) (emphasis added).

The State came back to the brothers' genetic and family circumstances and other similarities and their

resulting equal blameworthiness over and over again. The prosecutor stated, "we point to each defendant, two defendants, two brothers, two culprits, two criminals, two individuals all found to be culpable of capital murders of four people." *Id.* at 394 (Tr. Vol. 46 at 131). And the prosecutor referred to a picture of Reginald and Jonathan Carr as children and argued:

> These kids are gone. They don't exist anymore. These children have grown up to adults that didn't just lose their moral compass, ladies and gentlemen, they threw it away. These are individuals who lead and led their lives with the reckless disregard for the rights of others. Who committed crimes that were heinous and atrocious and cruel and vi[le]

Id. at 398 (Tr. Vol. 46 at 136-37).

As the prosecutor concluded:

> These defendants share a lot of things in common. They have somewhat of a common family history, although they were separated at times. Separated for a good period of time when Reginald Carr was in prison. They have the same eye color. They share some DNA. They share intelligence. They also share immediate self gratification. That they want something and they want it now. And they also share choices.

Id. at 402 (Tr. Vol. 46 at 142).

It was Reginald Carr's mitigation case that provided the State with ammunition to taint Jonathan Carr's mitigation case with Reginald Carr's sociopathy and dangerousness. As noted, Dr. Woltersdorf, the neuropsychologist who had tested Reginald Carr, testified that "Reginald has antisocial

personality disorder." *Id.* at 300 (Tr. Vol. 44 at 41) He explained that:

> [I]n Reginald's case, the antisocial personality will show itself in difficulties with anger management and difficulties with authority which [are] the two hallmarks of antisocial personality disorder. *There is no treatment for a personality disorder.* It's something that he was given, so to speak, in life, somewhere between birth and the fifth year of life.

Id. at 301 (Tr. Vol. 44 at 42) (emphasis added).

See *id.* at 307 (Tr. Vol. 44 at 48-49) (this kind of "personality disorder, you cannot treat it. I mean a person was made this way in the first five years of life, usually by a family situation.").

In addition, Dr. Reidy, a forensic psychologist also testifying on behalf of Reginald Carr, noted that he had looked at family criminality and a family history of mental illness, saying "there's some evidence that there may be some genetic link there." *Id.* at 219 (Tr. Vol. 43A at 32). See *id.* at 220 (Tr. Vol. 43A 34)("I'm talking about family criminality. We're talking about family mental illness."). Thus, Reginald Carr's chosen mitigation case—that he had an untreatable disorder arising from his DNA and his family history and circumstances—necessarily affected the jury's perception of Jonathan Carr, who shared that DNA, history, and context.

It is no answer to say that the jury was obligated, and should be presumed to follow the single instruction on individualized consideration, because such testimony about "family criminality" necessarily implicated Jonathan as well as Reginald Carr. And, further, had there in fact been a severance, the State

could not have used that evidence against Jonathan Carr in a separate trial.[3]

But in the joint penalty phase, Reginald Carr's mitigation case was used by the State to encourage the jury to attribute Reginald Carr's future dangerousness (inferred from both the visible shackling and the diagnosis of incurable sociopathy) to Jonathan Carr, and to impose the death penalty on both brothers. Cf. *Foster* v. *Commonwealth*, 827 S.W.2d 670, 682 (Ky. 1991) (admission of prior acts of misconduct and evidence regarding "battered wife syndrome" of co-defendant were prejudicial to defendant Foster and made the two defendants' mitigation evidence antagonistic).

B. Jonathan Carr's Efforts To Present An Independent Mitigation Case Were Prejudicially Compromised.

In his mitigation case, Jonathan Carr sought to make two points. First, he attempted to differentiate himself from Reginald Carr in several respects: his "lack of a serious criminal record prior to these offenses," J.A. 430 (Tr. Vol. 46 at 178); his relative youth, *id.* at 430-31 (Tr. Vol. 46 at 178) (both statuto-

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[3] The foregoing also makes clear that Jonathan Carr is not arguing that the Eighth Amendment creates a *per se* rule against joinder in capital sentencing proceedings. The erroneous admission of evidence in a capital sentencing proceeding does not always prevent a jury from individualized consideration of defendants; nor does a contrast between co-defendants always prevent the jury from exercising mercy. But here, the State's strategy was to emphasize that the defendants are brothers, united in culpability and in moral responsibility, and Reginald Carr's mitigation case presented him as an incurable, dangerous sociopath in part due to his DNA. In these unusual circumstances, Jonathan Carr was unable to make his individualized case for mitigation.

ry mitigating circumstances, see Pet. App. 573-74); and his good behavior during trial, J.A. 431 (Tr. Vol. 46 at 178-79). Second, he sought to explain his behavior through the testimony of Dr. Mark Cunningham, a clinical and forensic psychologist, who testified about Jonathan Carr's genetic predispositions, cognitive deficiencies, his family circumstances and traumatic incidents in his youth (including a wrongful accusation of rape and its fallout). Tr. Vol. 45A at 4-145; Tr. Vol. 45B at 4-140. The drumbeat of the State's presentation prevented individualized consideration of Jonathan Carr's significant points of difference, including the absence of a prior record. Critically, moreover, the State's linkage between Reginald and Jonathan Carr, most notably the common wellsprings of dangerousness and sociopathy in their DNA and upbringing, prevented the jury from considering Jonathan Carr's evidence about his genetic predispositions and his upbringing in mitigation. Indeed, evidence that should have been mitigating became damning, as it tied Jonathan Carr to Reginald Carr's incurable pathology and dangerousness, and prevented the jury from "giv[ing] meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on" Jonathan Carr. *Abdul-Kabir*, 550 U.S. at 246.

The prosecution's seizure of the DNA cudgel and Reginald Carr's behavior also put at substantial risk Jonathan Carr's ability to appeal to the jurors' individual and collective sense of mercy. Under Kansas law, trial courts instruct penalty phase juries that "[m]itigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they

do not justify or excuse the offense" and that "you may consider sympathy for a defendant." Pet. App. 573. That appeal, however, meant much less here in light of Reginald Carr's mitigation evidence and the prosecutor's urging that the brothers should be considered a team.

C. Heightened Reliability Concerns Require A Lower Threshold For Severance In Penalty Phase Proceedings.

With respect to the question presented here, the appropriate severance standard for penalty phase capital proceedings would call for severance where there exists any reasonable risk that the jury may impute material prejudicial evidence against one defendant, where that evidence would be inadmissible or otherwise absent in a separate penalty phase proceeding against the disadvantaged defendant. Essentially, "because there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Zant*, 462 U.S. at 884-85 (quoting *Woodson*, 428 U.S. at 305). As *Zafiro* recognizes, joint trials result in increased efficiencies, but those efficiencies may give rise to "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment . ." 506 U.S. at 539. Thus, *Zafiro* makes clear that efficiency does not trump constitutional concerns, *id.*, a point with particular salience in capital cases.

The Eighth Amendment's requirement for individualized sentencing also requires heightened vigilance with respect to the risks of prejudice arising from a joint trial in a capital sentencing. See *Lockett*, 438

U.S. at 605 ("an individualized decision is essential in capital cases [and] [t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). The requirement for vigilance fell on all parties in the courtroom in this case, including the trial court, the prosecutor and defense counsel. Kansas law in capital cases exempts defense counsel's ineffective assistance in such an obvious instance, but not the trial court's oversight.

Here, as the Kansas Supreme Court held, the trial court erred by refusing to sever the guilt phase of Reginald and Jonathan Carr's capital trial where their defenses were antagonistic. Pet. App. 191-92. The trial court compounded that error by its refusal to sever the penalty phase of the proceedings, and the joint penalty phase proceedings allowed and encouraged the jury to consider evidence that pertained to Reginald Carr against Jonathan Carr and prevented the jury from an individualized and full consideration of Jonathan's mitigation evidence. These errors denied Jonathan Carr his right to an individualized determination of death and rendered the jury's verdict unreliable. *Zafiro*, 506 U.S. at 539. That reliability concern, in turn, necessitates vacatur of Jonathan Carr's death sentence.[4] See also *United States* v. *Tipton*, 90 F.3d 861, 892 (4th Cir. 1996) ("trial court dis-

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[4] Because the failure to sever the penalty phase proceedings here rendered the verdict unreliable and thus unconstitutional, this Court need not decide whether the Constitution permits *Zafiro*'s presumption favoring joinder in the penalty-phase of capital cases. There is a serious question whether a presumption favoring joint trials is appropriate in capital cases in light of the heightened reliability concerns in those cases, at least where one defendant has presented some evidence that he would be prejudiced by a joint trial or sentencing.

cretion as to severance in the capital-penalty phase must be considered . . constitutionally constrained at its outer limits and, as a corollary, . our standard of review is for abuse of a discretion" is constrained by "the Supreme Court's 'individualized consideration' jurisprudence . ").

The outcome here is not surprising. The United States' brief identifies 35 capital trials involving multiple defendants since 2000. U.S. Br. 20-21 n.6-7. Joint penalty phase proceedings were held in 19 of those cases; but in 16 cases, the district court granted motions to sever at either the guilt or penalty phase of the case. *Id.* at 20-21 n.6-7 & App. A. Thus, in 47% of federal capital cases—roughly half—the trial court has deemed severance necessary. This record does not support a presumption favoring joinder in penalty phase proceedings in capital cases, and suggests that trial court judges often recognize that joint proceedings may prejudice one or both defendants.[5]

This conclusion need not result in separate trials for each defendant where the prejudice concerns arise only at sentencing. As trial judges have recognized, "if severance is not required for the liability trial, the individualized determination objective can be largely achieved by holding sequential, separate penalty trials for each defendant." *United States* v. *Aquart*, No. 3:06cr160, 2010 WL 3211074, at *7 (D. Conn. Aug. 13, 2010). Moreover,

> [conducting] [s]equential penalty phases has the advantage of preserving a joint guilt phase,

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[5] And while most states with capital punishment regimes have liberal joinder rules, two states require that any request for severance in a capital case be granted and a third creates a presumption of severance. U.S. Br. 20-21 n.7 (surveying relevant states' laws).

> which promotes judicial economy and avoids the potential inequity of conflicting verdicts by using one jury; minimizing the risk that co-defendants "prosecute" one another at a joint penalty phase; providing defendants with an individualized determination of sentence; and ensuring that the jury that determines guilt also determines sentence.

United States v. *Henderson*, 442 F. Supp. 2d 159, 162 (S.D.N.Y. 2006). See also *United States* v. *Taylor*, 293 F. Supp. 2d 884, 900 (N.D. Ind. 2003) ("consecutive sentencing hearings at which the cases for and against one defendant are presented and after which the jury deliberates only on the sentence to be imposed on that one defendant will facilitate the jury's individualized consideration of each defendant.").

Conducting sequential penalty phase proceedings here would have forestalled the prejudice described above. The jury would not have seen Reginald Carr's shackles while deciding Jonathan Carr's sentence, and the State would have been required to address whether each brother deserved death individually. Further, the jury would not have heard that Reginald Carr was an incurable sociopath as a result of DNA and family circumstances that Jonathan Carr shared. Cf. *Henderson*, 442 F. Supp. 2d at 162 ("[s]equential penalty phases in a multi-defendant capital trial, though not favored, have occurred, especially where one defendant has mitigating [here aggravating] evidence of such force that it places his co-defendant at a unique disadvantage.") (citation omitted).

II. THE JURY INSTRUCTION DID NOT CURE THE PREJUDICE TO JONATHAN CARR ARISING FROM THE FAILURE TO SEVER.

The State argues that prejudicial errors described above were cured by a single instruction given to the capital jury before it heard the State's closing arguments. In so arguing, the State leans heavily on the generalization that jurors are presumed to obey the instructions they receive. See Pet'r Br. 36-39. But that presumption is subject to a long-established exception: "where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission." *Throckmorton* v. *Holt*, 180 U.S. 552, 567 (1901). See *Hopt* v. *People*, 120 U.S. 430, 438 (1887) (same); *Waldron* v. *Waldron*, 156 U.S. 361, 383 (1895) ("the curative effect of the correcti[ve instruction] . . depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court."). More recent opinions have recognized this exception as well. *E.g.*, *Bruton* v. *United States*, 391 U.S. 123, 135-36 (1968) ("there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.") (citations omitted).[6]

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[6] *See also, e.g.*, *United States* v. *Hale*, 422 U.S. 171, 172-73 (1975) (jury instructions do not cure the prejudice arising from the prosecutor's inquiry into a defendant's silence when arrested, even though he had invoked Miranda rights); *Grunewald* v. *United States*, 353 U.S. 391, 423-24 (1957) (jury instructions do not cure the harm caused by the prosecutor's questioning of a

This Court has distilled from its precedents three factors most likely to determine whether the usual presumption that juries follow instructions holds true: first, "the likelihood that the instruction will be disregarded"; second, "the probability that such disregard will have a devastating effect"; and third, the "determinability of these facts in advance of trial." *Cruz*, 481 U.S. at 193 (citing *Bruton*, 391 U.S. at 136; *Marsh*, 481 U.S. at 210). All three factors here point to the exception, not the rule, and the jury should not be deemed to have followed the lone instruction provided to them about individualized treatment of the two Carr brothers.

Turning to the first factor, as explained above, the jury was likely to neglect the trial court's instruction on individualized consideration in light of the prejudicial effect of Reginald Carr's shackling on Jonathan, the State's direct linking of the brothers through their DNA and family circumstances, and the State's leveraging of Reginald Carr's incurable sociopathy and dangerousness against Jonathan. See *supra* at 26-30. Even assuming *arguendo* that some instructions might have forestalled this significant

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defendant who had invoked his Fifth Amendment privilege); *United States* v. *Parks*, 411 F.2d 1171, 1172-73 (1st Cir. 1969) (jury instruction did not cure prejudice arising from presentation of inadmissible documentary evidence throughout trial); *Davidson* v. *Smith*, 9 F.3d 4, 8 (2d Cir. 1993) (same, where irrelevant testimony on the plaintiff's psychiatric history was elicited); *Mora* v. *United States*, 190 F.2d 749 (5th Cir. 1951) (same, where co-defendant's confession was admitted); *Maytag* v. *Cummins*, 260 F. 74, 83 (8th Cir. 1919) (same, where the jury issued an unusually large verdict in an action for slander after hearing substantial immaterial and irrelevant evidence); *Holt* v. *United States*, 94 F.2d 90 (10th Cir. 1937) (same, where the statement of a co-conspirator had probably made such a deep and lasting impression on the minds of the jurors that the curative instruction was insufficient).

prejudice to Jonathan Carr, the lone instruction here did not. As noted, the judge did not instruct the jury to avoid drawing the inference that Jonathan Carr is a continuing danger to the community from Reginald Carr's shackles. And, the instruction requiring individualized consideration of the evidence, see J.A. 379-80 (Tr. Vol. 46 at 114-15), came only once and was "ineffective to repair or even to mitigate the damage." *Parks*, 411 F.2d at 1172-73 (jury instruction did not cure prejudice where the jury was exposed to numerous irrelevant exhibits throughout the trial, but was instructed to disregard them only later because the jury "could not possibly have been able to erase the irrelevant evidence from its collective mind").

Indeed, in light of the substantial risk that the jurors could conflate the brothers, exacerbated by the State's arguments, the trial court should have instructed the jurors to give each defendant individualized consideration throughout the penalty phase (or on at least some of the many occasions when the State argued that the brothers were a single unit). Cf. *Tipton*, 90 F.3d. at 892 ("we are satisfied that the court's *frequent* instructions on the need to give each defendant's case individualized consideration sufficed to reduce the risk to acceptable levels.") (emphasis added).[7]

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[7] *Tipton*, 90 F.3d at 892-93, illustrates a trial judge's protective use of instructions to ensure individualized consideration of defendants tried together.

> At the outset of the penalty phase, the court—obviously aware of the special risk—admonished the jurors that they "must consider each defendant individually." In its concluding instructions on the jury's duty "to decide whether each individual defendant shall live or die," the court reiterated that the duty was "to make a decision regarding each defendant and each capital case." Fur-

Here, the judge's instruction preceded some of the State's most prejudicial arguments. Contrary to the instruction, those arguments essentially urged the jury to treat the brothers as a unit, which likely undid any compartmentalizing benefit that the instruction might have achieved. J.A. 391 (Tr. Vol. 46 at 128). Cf. *Boyde* v. *California*, 494 U.S. 370, 384-85 (1990) (noting that prosecutorial misrepresentations may have a decisive effect on juries, though they can be corrected by courts). That argument was the State's final word before the jury deliberated, and its content made it substantially less likely that the jury instruction the State relies on prevented the prejudice described *supra* at 26-30.

In response, the State claims that "this jury had already demonstrated its ability to differentiate" between the Carr brothers by convicting them of different counts at the guilt phase, see Pet'r Br. 17. But, the jury's tasks in the guilt and penalty phases are fundamentally different. Determining whether the State has proven each of a specific set of elements of a specific crime is much more concrete than determining whether a defendant, on balance and in light of

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> ther, in its instructions on the critical weighing process, the court especially emphasized the need for individualized consideration by pointing out that . . . each defendant relied on mitigating factors specific to his case. This critical point was further emphasized by the court's submission of separate packets of penalty verdict forms for each defendant. Still further emphasis occurred in the court's remonstrances to Government counsel to "be specific" and to "do it individually," whenever objections were made to Government counsels' references to the defendants collectively.

Tipton, 90 F.3d at 892-93 (citations omitted).

all possible aggravating and mitigating evidence, "deserves" to die or should receive mercy.

As for the second factor, the pressure upon the jury to consider Jonathan Carr "together" with his brother is likely to have had a devastating effect. It allowed the jury to consider substantial evidence of Reginald Carr's dangerousness and incurable sociopathy in deciding to sentence Jonathan Carr to death.

Finally, for the third factor, the prejudice that arose from this joint penalty phase proceeding was foreseeable. Throughout the guilt phase, Jonathan Carr had repeatedly requested that his case be severed from his brother's. He again made that request at the outset of the penalty phase. And before the penalty phase began, Reginald Carr decided to display to the jury his shackles and, by implication, his future dangerousness. Indeed, the trial court was well aware that the State was treating the brothers as a single entity. The State's strategy in the penalty phase was simply a continuation of its strategy at trial.

III. THE ERROR WAS NOT HARMLESS.

This Court has generally held that the prosecution must prove beyond a reasonable doubt that a constitutional error did not contribute to a verdict in order to demonstrate that an error was harmless and a verdict may stand. See *Chapman* v. *California*, 386 U.S. 18, 24 (1967). This Court employs harmless error analysis in those cases where the scope of an error is "readily identifiable" and "the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." *Holloway* v. *Arkansas*, 435 U.S. 475, 490 (1978).

With respect to the evaluation of harmless-error analysis in capital sentencing proceedings, this Court has observed:

> [T]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.

Satterwhite, 486 U.S. at 258. Accordingly, while this Court does apply the harmless-error rule to the wrongful admission of evidence in capital sentencing proceedings, it has cautioned that this evaluation must be done with full recognition that determining the effect of error in the capital sentencing process presents both heightened importance and greater difficulty than in run-of-the-mill cases. See also *Mills* v. *Maryland*, 486 U.S. 367, 376 ("[i]n reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.").

The question is not "whether the legally admitted evidence was sufficient to support the death sentence but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite*, 486 U.S. at 258-59 (quoting *Chapman*, 386 U.S. at 24). The State cannot satisfy that standard here.

A reviewing court cannot be secure that Reginald Carr's shackling and the prosecutor's blurring of the lines between the brothers, including Reginald Carr's dangerousness and sociopathy, did not taint the jury's determination of Jonathan Carr's sentence. Moreover, it is unclear whether Jonathan Carr's lack of a prior criminal record, suicide attempts, family circumstances and other mitigating evidence might

have moved the jury to mercy were it not for the aggravating perception of future, incurable dangerousness resulting from joint proceedings with his brother. Significantly, the State repeatedly emphasized the numerous connections between the brothers (genetics, family circumstances, equal culpability), driving home the message that if Reginald Carr deserved death, so too did Jonathan Carr. Cf. *Clemons* v. *Mississippi*, 494 U.S. 738, 753 (1990) (error was not harmless because "the State repeatedly emphasized and argued the [invalid] 'especially heinous' factor during the sentencing hearing" while giving "little emphasis" to other aggravating factors).

Both aspects of this unconstitutional failure to provide Jonathan Carr with an individualized death sentence were exacerbated by the trial court's prior erroneous failure to sever the guilt phase proceedings. Reginald and Jonathan Carr had already served at trial as "second prosecutors," each seeking to place greater blame for these capital crimes on the other in the hope of obtaining some kind of forbearance for himself. See *supra* at 3-4. Although the Kansas Supreme Court found the erroneous failure to sever the guilt phase harmless by itself, Reginald Carr's antagonistic portrayal of Jonathan Carr's culpability must be considered when assessing the effect of the further erroneous failure to sever the penalty phase.

In addition, "an appellate court is ill equipped to evaluate the effect of a constitutional error on a sentencing determination. Such sentencing judgments, even when guided and channeled, are inherently subjective." *Satterwhite*, 486 U.S. at 262. See *id.* ("[b]ecause of the moral character of a capital sentencing determination and the substantial discretion placed in the hands of the sentencer, predicting the reaction of a sentencer to a proceeding untainted by

constitutional error on the basis of a cold record is a dangerously speculative enterprise."); *Zant*, 462 U.S. at 885 (although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.").

IV. THE JURY INSTRUCTIONS CREATED A REASONABLE LIKELIHOOD THAT JURORS WOULD FAIL TO CONSIDER MITIGATING CIRCUMSTANCES.

The jury instructions in this case failed to inform the jury that Jonathan Carr was not required to meet any particular burden of proof in order for the jury to weigh his mitigation evidence against the State's aggravating factors. Instead, the instructions repeatedly emphasized the "beyond a reasonable doubt" standard, even though that standard applies only to the State's evidence of aggravating circumstances, not to defendant's mitigation evidence. As a result, they created "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant [mitigation] evidence." See *Boyde*, 494 U.S. at 380; *Mills*, 486 U.S. at 383-84.

This argument is presented in full in the briefs of Sidney Gleason and Reginald Carr. Rather than burdening the Court with duplicative briefing on this issue, we incorporate those arguments by reference here. Below, we briefly address certain distinctions between the instructions and arguments in this case and those in Mr. Gleason's case, which only serve to support the arguments made there.

The specific instruction on mitigating circumstances in Jonathan Carr's case (Instruction No. 8) includ-

ed the following vague language: "[i]n this proceeding, you may consider sympathy for a defendant." Pet. App. 573. This sentence says nothing about the burden of proof, and adds nothing to the instruction (present in both cases) that the "appropriateness of exercising mercy" can itself be a mitigating factor. See *id.* The State emphasizes that this instruction also told the jurors they could "consider as a mitigating circumstance" both the listed factors and "any other factor which you find may serve as a basis for imposing a sentence of less than death." Pet'r Br. 57 (emphasis removed). But (as in Mr. Gleason's case) this merely informs the jury that "any ... factor" can *qualify as* a mitigating circumstance; it does not address how the jury can determine *which* ostensible mitigating factors can be "found to exist" and thus weighed against the aggravating circumstances, as the other instructions require. See Pet. App. 571.

The other noteworthy difference in the instructions was the addition of the following sentence in Instruction No. 2: "[i]f any statements are made regarding the law of the case that are not set out in these instructions of law, such statements should be disregarded." Pet. App. 567. Again, this tells the jury nothing about the burden of proof. Insofar as it is relevant, this sentence serves only to contravene the State's claim that the parties' arguments would have helped clarify the standard of proof applicable to mitigation evidence, see Pet'r Br. 58, since the jury was told to "disregard" arguments inconsistent with the instructions themselves.

In any event, the prosecutor's arguments did not clarify the applicable standard of proof. The State emphasizes that the prosecutor told the jury that mitigating circumstances can include anything the jury deems to extenuate or reduce culpability. See Pet'r

Br. 58. But again, informing the jury that any fact can serve as a mitigating circumstance does not make clear the standard the jury should apply in deciding that a specific mitigating factor can—or cannot—be "found to exist." In this respect, the prosecutor's argument adds nothing to the instructions.

Elsewhere, the prosecutor's arguments were affirmatively damaging to the jury's proper understanding. The prosecutor told the jury that the defendants had "to prove" mitigating circumstances, which naturally suggests to the jury that mitigating evidence must meet a standard *of proof*. See, *e.g.*, J.A. 62 (Tr. Vol. 41A at 10-11) ("mitigators" are "whatever [the defendants] choose to prove to show or lessen or to change [their] culpability "). The prosecutor then referred explicitly to a "threshold" that mitigating evidence must meet: "jurors as officers of the court are sworn to follow that law [and impose death] if they find that the evidence that's presented by the State has shown that any mitigating circumstances don't rise to the threshold of mitigating that which has occurred." *Id.* at 62-63 (Tr. Vol. 41A at 10-11). This argument manages to link the State's evidentiary burden—beyond a reasonable doubt, as the jury has been told repeatedly—to some otherwise-unspecified "threshold" that mitigation evidence must clear. It thus compounds the instructions' misleading effect.

Finally, as in Mr. Gleason's case, the unchallenged introduction of mitigation evidence, by itself, establishes nothing, because the question here is not whether the jury thought it could *consider* the mitigating evidence that was introduced (as was true in *Boyde*, 494 U.S. at 383–84), but rather what burden of proof that evidence was to be measured against. Further, as the State concedes, the parties here did

genuinely dispute the existence of at least one mitigating circumstance: whether both Carr brothers suffered from brain abnormalities. See Pet'r Br. 60. The Carrs presented expert testimony that PET scans of each brother's brain revealed abnormal brain function. Tr. Vol. 42, at 69-99. The State's rebuttal witness took the position that the PET scans revealed normal brains. Tr. Vol. 46, at 58-90. In light of what the State admits was "a battle of experts" as to the *existence* of a particular mitigating circumstance, Pet'r Br. 58, there can be no question that the State directly challenged the Carrs' ability to—in the prosecutor's words—"prove [something]" that "lessen[s] [their] culpability," J.A. 62 (Tr. Vol. 41A at 10-11); see *id.* at 400-01 (Tr. Vol. 46 at 140)(prosecutor arguing that the evidentiary "foundation of this sympathy and abuse [mitigator] . had . disappeared."). That challenge directly implicates the applicable standard of proof for mitigation evidence.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

JEFFREY T. GREEN
CLAYTON G. NORTHOUSE
KELLY A. ROSENCRANS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

SARAH ELLEN JOHNSON *
MERYL CARVER-ALLMOND
CAPITAL APPELLATE
DEFENDER OFFICE
700 Jackson, Suite 903
Topeka, KS 66603
sjohnson@sbids.org
(785) 368-6587

Counsel for Respondent

August 17, 2015

* *Counsel of Record*

No. 14-449, 450

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR AND
REGINALD DEXTER CARR, JR.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF FOR PETITIONER

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com
Counsel for Petitioner

September 2015

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

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CONSTITUTION

U.S. Const. amend. VIII *passim*

SUMMARY OF ARGUMENT[1]

The "severance" issue distills down to one fundamental legal question: Does the Eighth Amendment require that courts apply a different standard than the traditional one (*i.e.*, that joinder will create a serious risk of compelling, specific, and actual prejudice) for determining whether severance is appropriate in capital penalty phase proceedings? Although each Carr ostensibly disavows arguing for an automatic rule of severance for capital sentencing proceedings, their arguments, if followed, effectively would impose a *per se* requirement.

Jonathan Carr argues that severance is required if there is "any reasonable risk" of prejudice, and Reginald Carr argues for a standard of "substantial risk" of prejudice. Both find their novel standards easily satisfied here on the basis of the flimsiest of evidence. In fact, both Carrs rely on circumstances so weak here–where the brothers presented virtually identical mitigation cases–that in application their proposed standards would result in automatic severance.

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[1] Because the Court desires to address the "mitigation instruction" question in the first hour of oral argument and the "severance" question in the second hour on October 7, Kansas has filed a reply brief in *Kansas v. Gleason*, No. 14-452, that addresses the mitigation instruction arguments made by Respondents Gleason, J. Carr, and R. Carr. This brief addresses only the severance question. By this footnote, Kansas respectfully incorporates by reference the mitigation instruction arguments from its reply in *Kansas v. Gleason*.

There is no reason for this Court to create a severance standard unique to capital cases; instead, there are very good reasons not to do so. Joint criminal trials, a feature of American jurisprudence since the founding era, serve many valuable purposes. This case is a perfect example of how the reliability of the jury's decisions likely was enhanced by hearing *more* information and being able to compare the moral culpability and mitigation evidence of both Carrs simultaneously. Joinder often may further the modern Eighth Amendment "individualized sentencing" principle better than would severed proceedings.

Joinder was proper here, and did not create a "serious risk of compelling, specific, and actual prejudice" to either Reginald or Jonathan. *First*, the Kansas Supreme Court erred in disregarding the presumption that jurors follow their instructions. The jury here was instructed explicitly to consider each brother individually, to consider as aggravation only the four factors specifically set out in the instructions, and the jury completed separate, detailed verdict forms for each Carr. Both Jonathan and Reginald argue that the presumption should not apply, but their argument flies in the face of the Court applying this bedrock principle in prior capital cases. *See, e.g.*, *Romano v. Oklahoma*, 512 U.S. 1, 13 (1994); *Jones v. United States*, 527 U.S. 373, 394 (1999).

Second, the Carrs presented virtually identical mitigation cases, with evidence that was mutually reinforcing, as even they acknowledge in their briefs. Reginald and Jonathan called many of the same mitigation witnesses, RC Br. 3, with the vast bulk of their mitigation evidence focusing on their shared

family history and asserted mental health issues resulting from that history. Rather than presenting antagonistic mitigation cases, overall the brothers offered synergistic and complementary evidence and arguments.

Jonathan complains that Reginald's antisocial personality disorder diagnosis (in lay terms, sometimes described as "sociopathy") was somehow imputed to Jonathan, and that Reginald's refusal to conceal his shackles during the penalty phase prejudiced Jonathan. JC Br. 15-16. Jonathan, however, presented evidence that, like Reginald, he had mental health issues attributable to his family history and numerous risk factors for violence. He also argued he was distinguishable from Reginald because Jonathan had no serious prior criminal record, was relatively young, and demonstrated good behavior during trial. Jonathan's evidence and arguments thus either echoed and reinforced Reginald's arguments or served to distinguish Jonathan from Reginald. Indeed, Jonathan's complaints illustrate the benefits of permitting the jury to compare him to Reginald in a joint proceeding.

Reginald's only complaint is that there was some evidence he was a "corrupting influence" on Jonathan—evidence provided by their mother, sister, and a forensic psychologist Jonathan called, RC Br. 17-19—and that such evidence may have been improperly considered as an aggravating circumstance against him. Even if such evidence would not have been admitted in a severed proceeding, its admission did not violate the Eighth Amendment, *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994), nor did it so infect the proceeding

that he was deprived of due process. It strains credulity to believe—in a case involving sexual torture and quadruple brutal murders—that the jury put great weight on the self-evident proposition that Reginald was not an ideal big brother to Jonathan. Reginald's complaint hardly rises to the level of "a serious risk of compelling, specific, and actual prejudice" in light of the record as a whole.

In the end, Jonathan's and Reginald's claims fall flat. Their claims fail as a constitutional matter because the Eighth Amendment neither mandates automatic severance in capital sentencing proceedings, nor alters the traditional standard for severance determinations. The trial court did not abuse its discretion or violate the Eighth Amendment here when it declined to sever the penalty phase proceedings.

Lastly, even if the Court were to assume error, any error necessarily was harmless. Jonathan obtained many tactical advantages from Reginald's presence and behavior, and yet the jury still sentenced him to death. Reginald's weak complaint about evidence that might not have been admissible in severed proceedings pales in comparison to the undisputed evidence of his depraved crimes.

Ultimately, if any capital defendants in Kansas were ever going to receive a death sentence, it was Jonathan and Reginald Carr, each of whose horrific crimes have no equal in Kansas history. Their individual death sentences—carefully rendered after a full day of jury deliberations, as Reginald acknowledges, RC Br. 6—were imposed on *each* brother, precisely because *each* of them independently and fully deserved such a sentence under Kansas law

and the evidence presented. There is no reasonable doubt on that point.

ARGUMENT

I. The Eighth Amendment Does Not Mandate Automatic Severance In Capital Cases, Nor Does It Impose A Unique Standard. To The Contrary, There Often Are Strong Reasons For Joinder In Capital Proceedings.

Joint criminal trials are an established feature of American jurisprudence. The Court has endorsed joint trials since at least 1827, including in capital cases, *United States v. Marchant & Colson*, 25 U.S. (12 Wheat.) 480 (1827); *Ball v. United States*, 163 U.S. 662 (1896), and state and federal law overwhelmingly continue to provide for joint trials, including in capital cases. See U.S. Br. 19-20 & nn. 6-7.

Joint trials play an important role in our criminal justice system, and are beneficial both to defendants and to society for a number of reasons: "Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Richardson v. Marsh*, 481 U.S. 200, 210 (1987). Moreover, "[e]ven apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.* Joint trials permit juries to make consistent and fully informed decisions, particularly in a capital penalty phase proceeding where a jury can compare the defendants' culpability and mitigation cases. Thus, it would be counter-

intuitive to eliminate or sharply limit joinder in capital penalty phase proceedings, where "individualized" sentencing is an Eighth Amendment tenet.

A. Joint Penalty Phase Proceedings In Many Instances, Including This Case, Promote Individualized Sentencing.

Joint penalty phase proceedings not only are compatible with but actively further the "individualized sentencing" principle, because the jury can obtain the fullest possible picture of the codefendants and their relative culpability. Going back to *Gregg v. Georgia*, members of the Court have recognized that in capital cases it is proper and desirable for a jury to "have as much information before it as possible when it makes the sentencing decision ...." 428 U.S. 153, 203-204 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

Mandating separate proceedings in capital penalty phase proceedings would permit some defendants to preview the penalty phase evidence and arguments, thus increasing the possibility of inconsistent and inequitable verdicts. Different juries might consider intangibles such as "mercy" differently, resulting in equally culpable defendants with virtually identical mitigation cases receiving different sentences, as would have been possible here. Separate, repetitive proceedings also could require traumatized victims to testify multiple times, greatly increase the time commitment of jurors (or at least the number of jurors required to conduct the proceedings), and in general require governments to expend considerably more resources than they already do to try capital cases.

Here, the joint penalty proceeding avoided the need for the brothers' multiple overlapping witnesses to testify twice, avoided having different juries possibly assign varying weight to essentially the same evidence, gave jurors a fuller and more complete picture of each Carr's culpability and his mitigation case, and precluded either Carr from obtaining a tactical advantage by previewing evidence and argument regarding the other.

Importantly, a joint proceeding permitted the jury to evenhandedly consider "mercy" for each Carr, as Kansas law expressly permits. Conducting separate penalty phase proceedings with different juries would invite inconsistent sentences because different juries might well give "mercy" different weight as a sentencing consideration.

Ultimately, this case presents a compelling example for joinder, given that each Carr participated in the same horrific crimes and presented virtually identical mitigation cases. Joinder here ensured that these similarly situated capital defendants were not treated differently in arbitrary ways by two separate juries.

B. The Presumption That Jurors Follow Their Instructions Applies With Full Force In Capital Penalty Phase Proceedings.

Another important reason no mandatory or unique Eighth Amendment standard is appropriate or required in this context is the bedrock presumption that jurors follow their instructions. Instructions directing jurors to consider each defendant individually and to consider in aggravation only the factors specified in the instructions are generally sufficient to cure any

risk of prejudice from joinder. *Zafiro v. United States*, 506 U.S. 534, 540-541 (1993). Here, the jury was given precisely such instructions.

The Court long has embraced and emphasized the presumption that juries follow their instructions, including in capital cases. *See, e.g.*, *Romano v. Oklahoma*, 512 U.S. 1, 13 (1994) ("if the jurors followed the trial court's instructions, which we presume they did, this evidence should have had little–if any–effect on their deliberations."); *Jones v. United States*, 527 U.S. 373, 394 (1999) ("jurors are presumed to have followed these instructions."); *Blueford v. Arkansas*, 132 S. Ct. 2044, 2051 (2012).

Ultimately, the Court has expressed a strong "preference," *Zafiro*, 506 U.S. at 537, for joint trials in general, and has never reversed a death sentence for failure to sever, nor indicated that a special severance rule applies in capital cases. Respondents' novel suggestions to the contrary find no support in the Eighth Amendment, the Court's precedents, or in our nation's history and practice. Indeed, no federal Circuit has reversed a federal district court's decision not to sever capital penalty phase proceedings. See U.S. Br. 20 n. 6 (citing cases).[2] There is no reason for this Court

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[2] Amicus Promise of Justice Initiative (PJI) asserts a "clear trend away from joint trials" (Br. 13) but relies principally on States that have abolished the death penalty, evidence which does not reflect a judgment that joint capital sentencing trials are improper. PJI suggests (Br. 16) the United States "omit[s] a number of cases involving joined cases as well as those where severance has appeared to be granted," but the United States listed cases *since 2000*, which eliminates thirteen of the eighteen cases PJI cites; three others were not cases where joint or separate capital trials

to become the first federal court to reverse a death sentence because the penalty phase proceedings were not severed.

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occurred, *United States* v. *Bodkins*, No. 04-Cr-70083 (W.D. Va. 2004), Dkt. No. 586 (Sept. 8, 2005) (death notices were withdrawn); *United States* v. *Cruz*, No. 8:05-Cr-00393 (D. Md. 2005), Dkt. Nos. 1391 (Sept. 1, 2009) and 1642 (Aug. 6, 2010) (a single capital trial was conducted; remaining capital defendants pleaded guilty); *United States* v. *Aquart*, 3:06-Cr-160 (D. Ct. 2006), Dkt. No. 959 (Aug. 26, 2011) (a single capital trial was conducted; death notice was withdrawn for the additional capital defendant); and a fourth was included in the charts, *United States* v. *Mikhel*, No. 02-Cr-00220 (C.D. Cal. 2007), Dkt. Nos. 1066 (June 26, 2006), and 1560 (Feb. 13, 2007) (case proceeded to trial with two capital defendants, a third was severed for attorney's medical reasons).

II. Jointly Conducting The Sentencing Proceedings Did Not Violate The Eighth Amendment Because The Carrs Presented Virtually Identical Mitigation Cases, And The Jury Was Properly Instructed. Even If The Court Assumed Error, Any Error Necessarily Was Harmless.

A. There Was No Constitutional Error In Declining To Sever The Carrs' Sentencing Proceedings.

1. The Eighth Amendment Does Not Create Evidentiary Rules For Capital Sentencing Proceedings. Instead, The Standard For Any Error In Admitting Evidence Is Whether The Evidence So Infected The Proceeding With Unfairness As To Make The Resulting Sentence A Denial Of Due Process.

Reginald's primary complaint about joinder is that Jonathan allegedly attempted to portray Reginald as a negative influence in Jonathan's life. RC Br. 17. Jonathan's primary complaint is that testimony opining that Reginald has antisocial personality disorder may have been imputed to Jonathan because he and Reginald share the same DNA. JC Br. 26. Each brother asserts the evidence about which he complains would not have been introduced in separate sentencing proceedings. In other words, a proceeding for only Reginald would not have included "bad influence" evidence, and a proceeding for only Jonathan would not have included the "antisocial personality disorder / sociopath / DNA" evidence.

In *Romano v. Oklahoma*, 512 U.S. 1 (1994), the jury in a capital sentencing proceeding improperly heard evidence that the defendant was subject to a death sentence in a separate case. That evidence should not have been admitted against the defendant under Oklahoma law. The defendant argued the error violated the Eighth Amendment and required reversal of his death sentence.

The Court rejected the claim because the admission of evidence which "may have been irrelevant [to the defendant's death sentence] as a matter of state law" does not in turn "render[] its admission federal constitutional error." 512 U.S. at 10 (citing *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)). Rather, the admission of evidence in a capital sentencing proceeding violates the Eighth Amendment only when the evidence involves "constitutionally protected conduct" (such as freedom of speech). *Id.* at 11. Thus, the Court rejected any notion that its cases "stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence." *Id.*

The Court also rejected the position Respondents effectively appear to be asserting here—that the admission of evidence that may be inadmissible (under state law) in a penalty phase proceeding violates the Eighth Amendment:

> Petitioner's argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. We have not done so in the past,

> however, and we will not do so today. The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings.

512 U.S. at 11-12.

Instead, the *Romano* Court addressed the defendant's claim through a due process lens, emphasizing that "the proper analytical framework in which to consider this claim" is whether the error "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 512 U.S. at 12 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Applying this standard, the Court found no due process violation. The Court acknowledged the evidence was not admissible under Oklahoma law, but nonetheless found no federal constitutional error because, "if the jurors followed the trial court's instructions, which we presume they did, this evidence should have had little—if any—effect on their deliberations." 512 U.S. at 13. The instructions "explicitly limited the jurors' consideration of aggravating factors to the four which the State sought to prove." *Id.* Further, the "instructions did not offer the jurors any means by which to give effect to the" improper evidence, *id.*, "and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case." *Id.*[3]

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[3] *See also Estelle v. McGuire*, 502 U.S. 62, 67, 72, 75 (1991) (rejecting the argument that because evidence in a capital case was incorrectly admitted under California law it resulted in a federal constitutional error, instead finding no federal violation).

The same holds true here. Reginald is claiming that evidence Jonathan introduced was irrelevant and inadmissible with respect to Reginald, and Jonathan is making the same claim. Such complaints do not result in a federal constitutional violation, unless the admission of such evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." Here, as throughout these cases, "[s]tate law does not define the scope of federal constitutional guarantees." *State v. Gleason*, 299 Kan. 1127, 1212 (2014) (Biles, J, dissenting). Moreover, just as in *Romano*, the jury instructions here expressly limited the jurors' consideration of aggravating circumstances to the four statutory factors on which the State relied, the instructions did not give the jury any means by which to give the complained of evidence improper effect, and the relevant and admissible evidence on which the State relied (from the guilt phase) was more than sufficient to justify the death sentences.

Presuming the jurors followed their instructions, which the Court must, there is no basis for finding an Eighth Amendment (or a due process) violation. Even considering the precise details of each brother's complaints, as the State does in the following sections, the joinder of their penalty phase proceedings did not violate the Constitution.

2. Reginald And Jonathan Presented Virtually Identical Mitigation Cases.

Reginald and Jonathan each presented substantially similar evidence of their childhoods and family circumstances. RC App. 382-391, 394-400. Each brother emphasized parental abandonment,

inappropriate sexual exposure and conduct at an early age, and emotional and physical abuse by their parents. RC App. 396-399. Most of this evidence was presented through testimony of their mother, sister, and aunt; each brother relied heavily on these witnesses. RC Br. 4-5. In their briefs, each brother again emphasizes this same evidence, and relies upon it as the primary support for their mitigation cases. RC Br. 32-33; JC Br. 7-11.

Nonetheless, Reginald and Jonathan each point to alleged differences in their mitigation cases to claim they presented antagonistic cases and arguments. Their complaints, however, fall short of the mark, and fail to overcome the presumption that the jurors here followed their instructions to consider and assess each brother individually, to consider only the aggravating factors on which the State relied, and to impose a sentence solely on the basis of the evidence against *each* brother. It is not plausible to suggest—in a case involving unspeakable sexual torture and cold-blooded quadruple murder—the jurors would have focused on minimal evidence that Reginald was not an ideal big brother to Jonathan (a self-evident proposition), or would have imputed Reginald's mental health evidence to Jonathan because the two brothers shared the same DNA.

Notably, in the penalty phase proceeding no party—not the State, not Reginald, and not Jonathan—made any arguments to the jury that Reginald was a negative influence on Jonathan, or that Reginald's mental health issues should be imputed to Jonathan (who presented considerable mental health evidence of his own). Instead, these claims are post-

trial attempts to manufacture antagonistic defenses where none existed.

The brothers' virtually identical mitigation cases strongly reinforced each other's claims of a bad family history, including mental health issues. Thus, if anything, joinder likely made each of their mitigation cases stronger than had they proceeded separately. In any event, neither Reginald nor Jonathan ultimately can demonstrate a serious risk of compelling, actual, and specific prejudice from joinder.

a. Reginald was not prejudiced by Jonathan's "negative influence" evidence.

Reginald argues that Jonathan's evidence suggested "Reginald had turned his younger brother into a murderer and ruined his life," RC Br. 33, but that assertion is not supported by the record. To the contrary, each brother relied primarily on the mitigating evidence that their largely shared childhood had created risk factors leading to their violent crimes. That Reginald was not an outstanding role model for Jonathan reinforced rather than rebutted Reginald's mitigation evidence. Indeed, each brother's family history evidence effectively corroborated the other's evidence.

Reginald also relied on expert testimony in an attempt to establish that his childhood caused him developmental trauma that led to problems like impaired sexual impulse control and deficient identification with social ideals. RC App. 396-397. Any evidence that Reginald was not a positive influence on Jonathan supported rather than refuted such claims.

The allegedly antagonistic evidence in fact was mutually reinforcing, and supported Reginald's arguments that his childhood experiences should be considered mitigating.

Using common sense, the jury was unlikely to believe Reginald was the sole or even a primary cause of Jonathan's horrific crimes. The guilt phase evidence proved that Jonathan raped Holly G. and raped or attempted to rape Heather M. while Reginald was not even present in the house (because Reginald was taking other hostages to withdraw money from their bank accounts at ATMs). RC App. 38-39, 61. Thus, the jury was well aware that Jonathan was quite capable of committing terrible crimes without Reginald's influence or presence.

Moreover, the jury decided that Jonathan, too, deserved a death sentence. The jury did not spare Jonathan and sentence only Reginald to death. As the dissent below aptly put it, "the negligible impact of Jonathan Carr's mitigating evidence suggesting his brother had been a negative influence in his life is obvious from the jury's refusal to declare mercy and spare Jonathan instead of dealing him the same punishment as his brother." JA 493 (Moritz, J., dissenting). In light of the entire sentencing phase record, any "negative influence" evidence did not create the serious risk of compelling, specific, and actual prejudice necessary to require severance.

b. Jonathan was not prejudiced by Reginald's mental health evidence.

Jonathan's argument that Reginald's mental health diagnosis and evidence prejudiced Jonathan fails. The State pointed out that neither brother had expressed or presented evidence of remorse, and in making that point the State discussed Reginald's mental health evidence suggesting he was opportunistic and self-indulgent. JA 437. The State did not argue Jonathan had antisocial personality disorder, nor did it argue that Jonathan was "dangerous by association" because Reginald had such a diagnosis. There is no reason the jury would have imputed Reginald's specific diagnosis to Jonathan, or used that evidence to conclude Jonathan was more dangerous than the trial evidence already had established.

Further, Jonathan made the family's mental health issues part of his own mitigation case, JA 428, relying on that history, including his own depression and risk factors for violence. Indeed, in some respects, Jonathan's evidence played up his potential for violence. JA 430. That each brother presented evidence of mental health issues resulting from their largely shared childhood experiences (or DNA) was mutually reinforcing, and *each* presented evidence that he demonstrated numerous risk factors for violence.

Ultimately, there was no serious risk of compelling, specific, and actual prejudice to either brother from the presentation of their virtually identical family history and their mutually reinforcing mental health evidence. For Jonathan now to complain about evidence of Reginald's mental health when Jonathan himself offered extensive evidence that his own similar mental

health issues and risk factors should be considered mitigation, is disingenuous. The brothers did not present antagonistic defenses, and severance was not required.

3. Reginald's refusal to conceal his shackles did not prevent the jury from giving Jonathan individualized consideration.

There is no question Reginald was properly shackled for the penalty phase of the trial, and he does not argue otherwise, nor does Jonathan. The sole dispute regarding Reginald's shackling is whether his willful refusal to conceal his shackles from the jury's view resulted in prejudice to Jonathan. In considering Jonathan's arguments on this point, the Court should be mindful that Jonathan took advantage of Reginald's behavior in the sentencing proceeding. Indeed, in closing argument, Jonathan's counsel stressed Jonathan's good behavior in the courtroom, contrasting it with Reginald's behavior. JA 43. Thus, during the penalty phase proceeding, Jonathan actually drew the jury's attention to Reginald's courtroom conduct, apparently as a strategic choice. Yet now he complains there was prejudice to him from that very same conduct.

Jonathan cites a number of guilt phase decisions discussing the concept of "guilt by association" in arguing Reginald's visible shackles prevented the jury from giving Jonathan individualized consideration. Those cases are not directly relevant, however, because here both brothers' *guilt* already had been determined, and neither Jonathan nor Reginald contested their

guilt during the sentencing phase. *Guilt* by association was not a risk during the penalty phase.

Jonathan cites *Deck v. Missouri*, 544 U.S. 622, 624 (2005), as supporting his "dangerous by association" argument. *Deck*, however, has limited relevance here, both because it was not an Eighth Amendment case and because it did not involve a joint penalty phase proceeding. Although *Deck* held due process prohibits routine, visible shackling in the penalty phase of a capital proceeding, *id.* at 633, *Deck* does not addresses the issue here: whether the proper shackling (for legitimate reasons[4]) of one defendant requires severance of a codefendant. No court has ever held the proper shackling of one defendant in a joint penalty phase proceeding results in presumptive prejudice to a codefendant. *Deck* does not adopt or even discuss Jonathan's "dangerous by association" theory, nor does *Deck* suggest there was a constitutional violation here.

The Court should not adopt a "dangerous by association" presumption, nor should it find prejudice to Jonathan on this record. As an overarching consideration, adopting a presumption and requiring severance in this circumstance would give defendants an incentive to misbehave and disrupt penalty phase proceedings precisely in order to compel severance of those proceedings. Instead, curative jury instructions can address possible prejudice from behavior such as

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[4] The *Deck* Court recognized due process "permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants." 544 U.S. at 633.

Reginald's, if a co-defendant requests an instruction. Here, Jonathan did not request an instruction about Reginald's shackles. His decision not to do so appears to have been trial strategy. Far from suggesting Reginald's conduct was irrelevant to Jonathan, counsel for Jonathan drew attention to Reginald's conduct, arguing that Jonathan's superior conduct during trial weighed in favor of leniency. Jonathan should not now be permitted to have it both ways.

Further, Reginald's visible shackling more likely aided (rather than prejudiced) Jonathan's mitigation case. The State could not and did not rely on future dangerousness as an aggravating circumstance. RC App. 505-506. Instead, Reginald's shackling was at most relevant to the mitigating factor of whether imprisonment would be "sufficient to defend and protect the people's safety from the defendant." RC App. 508. If anything, the jury viewing Reginald in shackles—but not Jonathan—might have caused the jury to distinguish the two in a way *beneficial* to Jonathan's mitigation case. Reginald's visible shackles did not create a serious risk of compelling, specific, and actual prejudice to Jonathan.

4. The record establishes the jury considered and sentenced each brother individually.

That the State argued Jonathan and Reginald both deserved a death sentence—based on their individual and joint actions in this case—does not mean the jury was somehow prevented from giving each brother individualized consideration. To the extent the State discussed the brothers together, that treatment derived from the irrefutable proof they jointly participated in

many horrible crimes. There is no Eighth Amendment requirement that the State identify one codefendant as more (or less) culpable than another, or one as more (or less) deserving of a death sentence than another. That is especially so in a case like this, where each brother was both individually and jointly responsible for numerous horrific acts, and where neither brother showed any remorse for his actions.

The trial court did not instruct the jury to view the brothers as an inseparable unit for sentencing purposes; instead, the jury was expressly instructed to "give separate consideration to each defendant," and to "consider[] an individual defendant..." RC App. 501, 509. The jury also received separate instructions for each defendant's mitigating and aggravating circumstances, and a separate, detailed verdict form for each defendant. RC App. 502-503, 505-506; JA 461-492. Nothing in the jury instructions suggested the jury should treat the brothers as a team, or do anything other than give them individual consideration.

Nothing in the State's arguments suggested the jury should treat the brothers as a unit, or that the jury should not consider any mitigating evidence that was unique to one or the other brother. JA 391-392 ("You completed the first phase, the guilt phase, with the determination of as to the culpability of the individual defendants..."); JA 394 ("we point to each defendant, two defendants, two brothers, two culprits, two criminals, two individuals all found to be culpable of capital murders of four people."); JA 398 ("These are individuals who lead and led their lives with the reckless disregard for the rights of others....[T]here are not enough words to describe how vial [sic] and

despicable what these two individuals did to those young people in that field."); JA 398-399 ("These two individuals came from a family where some of their members of the family all from major lineal line, all sharing DNA, all from the scientific issues, these two individuals came from a family where some people worked for a living. Like their mom."); JA 401 ("And I certainly ask you to reflect on the abilities of these two gentlemen here. These two individuals, their acts.").

Of course the State argued each brother, convicted of capital murder for horrific crimes, deserved a death sentence. But the State never suggested or even implied the jury should deny each brother careful, individual consideration. Indeed, given the brothers' joint participation in these crimes and their virtually identical mitigation cases, it would have been surprising (and perhaps impermissibly arbitrary) had the State *not* argued for the same sentences. In cases such as this, where the defendants have committed the same crimes and offered the same mitigation cases, joinder is particularly appropriate in order to ensure that similarly situated defendants are treated the same.

Moreover, each brother had an unrestricted opportunity to present evidence and make arguments unique to himself. Reginald, for example, pointed to evidence that he tries to be a good father and that his children love him. JA 418. He also asked the jury to spare his life so he could maintain a relationship with those children. JA 423. Jonathan has no children and could make no such arguments.

Similarly, Jonathan's trial counsel emphasized Jonathan's lack of a serious prior criminal record,

Jonathan's relative youth, and Jonathan's good behavior during trial, JC Br. 11, 16, all factors unique to Jonathan, and repeated the same themes in his closing argument. JA 427, 430-431. Additionally, Jonathan offered witnesses who testified that they considered Jonathan a good person when they knew him. Jonathan also presented his own mental health evidence, regarding his depression and suicide attempts. JA 427-428, 431-432.

Thus, the jury's instructions, the parties' closing arguments, and the evidence all demonstrate Jonathan and Reginald both had every opportunity to make individualized arguments and receive an individualized sentencing determination. The jury's day-long deliberations, R. Br. 6; JA 448, further show that the jury took seriously its role to provide individualized consideration. Moreover, in the guilt phase, this same jury demonstrated its ability to consider Jonathan and Reginald individually when it acquitted Jonathan of certain crimes of which it convicted Reginald.

Here, Jonathan and Reginald Carr received death sentences because a fair, impartial, and thoughtful jury determined that each brother individually deserved that sentence; the brothers were not sentenced to death "as a team" and their joint penalty phase proceeding did not violate the Eighth Amendment.

B. Any Error Necessarily Was Harmless.

Even if the Court were to find error here, any such error necessarily would be harmless under any standard. The jury explicitly found *four* aggravating circumstances proven beyond a reasonable doubt for both Jonathan and Reginald. JA 461, 477. The proof

and strength of the aggravating circumstances in this case were overwhelming—so overwhelming that neither Jonathan nor Reginald even attempts to refute *any* of the aggravating circumstances. Even if the trial court had conducted separate penalty phase proceedings, all four aggravating factors were proven beyond a reasonable doubt against each brother in the guilt phase.

Any minimal differences in the mitigating evidence could not have made a difference in the ultimate outcome had the proceedings been severed. *First*, as already explained, each brother's mitigating evidence of family history, childhood experiences, and mental health issues was either virtually identical or mutually reinforced and corroborated the other brother's evidence. Thus, each brother benefitted in significant ways from the joint proceeding.

Second, any mitigating circumstances the jury found to exist here necessarily paled in comparison to the proof and strength of the aggravating circumstances. The dissenting Justice in the Kansas Supreme Court captured well why any error in failing to sever had to be harmless by any standard. Pet. Br. 50-53. Kansas will not repeat her observations in full here but, highly summarized, the record irrefutably demonstrates each brother participated in sexually torturing the four capital murder victims and the surviving fifth victim for more than three hours. Reginald took several victims to ATMs and forced them to withdraw cash from their bank accounts, while Jonathan remained in the house raping the female victims.

When Reginald and Jonathan tired of their depraved sexual torture and apparently decided they had obtained sufficient cash from the victims, they drove the five young adults to a field, forced them to kneel naked or partially clothed in below freezing temperatures, and shot each of the five victims in the back of the head, one-by-one, resulting in the execution of the four capital murder victims. But even that did not end the horrific acts of that evening. Instead, Reginald and Jonathan drove a vehicle over the victims' bodies before returning to the victims' home. The brothers then looted the home for valuables (including an engagement ring one victim had planned to give another), and gratuitously beat to death the dog of the sole surviving victim. Pet. Br. 50-53.

In light of the overwhelming, uncontested aggravating circumstances and both brothers' virtually identical but weak mitigation cases, it is not surprising the jury rejected Jonathan's and Reginald's pleas for mercy. Severing the penalty phase proceeding would not have changed the result. These individual sentences, beyond any doubt, were warranted under Kansas law on the record here.

CONCLUSION

The State of Kansas respectfully requests that the Kansas Supreme Court's decision be reversed.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioner

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In the Supreme Court of the United States

STATE OF KANSAS, PETITIONER

v.

JONATHAN D. CARR

STATE OF KANSAS, PETITIONER

v.

REGINALD DEXTER CARR, JR.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
JAMES I. PEARCE
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether respondents' Eighth Amendment rights were violated when the trial court declined to sever the sentencing proceedings at their capital trial and instead conducted a joint penalty proceeding.

2. Whether respondents' Eighth Amendment rights were violated because the judge did not affirmatively instruct the capital-sentencing jury that mitigating circumstances need not be proven beyond a reasonable doubt.

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In the Supreme Court of the United States

No. 14-449

STATE OF KANSAS, PETITIONER

v.

JONATHAN D. CARR

No. 14-450

STATE OF KANSAS, PETITIONER

v.

REGINALD DEXTER CARR, JR.

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the Eighth Amendment entitled respondents to reversal of their capital sentences because the trial court conducted a joint penalty proceeding, rather than granting a severance. The federal government prosecutes defendants jointly during the guilt and penalty phases of capital trials. Accordingly, the United States has a substantial interest in the resolution of that question. This case also presents the question whether the Supreme Court of Kansas erred by holding that the

Eighth Amendment required the trial judge to affirmatively instruct the sentencing jury that mitigating circumstances need not be proven beyond a reasonable doubt. The United States agrees with petitioner that the state court erred.[1] But because jury instructions in the federal system use distinct language,[2] the government does not further address that issue in this brief.

STATEMENT

1. Respondents Reginald Carr and Jonathan Carr committed an indescribably brutal crime spree of rapes, robberies, and violence in Wichita, Kansas, leaving five people dead.

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[1] The instructions at respondents' trial are naturally read to permit jurors to consider mitigating evidence unconstrained by any burden of proof—in accordance with the Kansas statutory framework upheld in *Kansas* v. *Marsh*, 548 U.S. 163, 176-177 (2006). No Eighth Amendment principle required a separate instruction to underscore what was already clear.

[2] Jurors in proceedings under the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, are expressly instructed on the FDPA's preponderance-of-the-evidence standard for mitigating circumstances. *E.g.*, 1-9A *Modern Fed. Jury Instructions—Criminal* ¶ 9A.02 (Matthew Bender); see 18 U.S.C. 3593(c). And jurors in capital court-martial proceedings are instructed to consider and weigh all mitigating "evidence"—regardless of whether any circumstance has been established by any burden of proof. Department of the Army, *Military Judges' Benchbook*, *Pamphlet 27-9*, at 1189 (2014) (model instruction stating that "all evidence in extenuation and mitigation" must be "balance[d] * * * against the aggravating circumstances"); see Court-Martial R. 1004(b)(6). Accordingly, even if the rationale of the Supreme Court of Kansas were valid, it would not imply that a separate instruction on the burden to prove mitigating evidence is required in court-martial proceedings.

The spree began on December 7, 2000, with the carjacking, beating, and robbery of Andrew Schreiber. In that crime, a man whom Schreiber identified as Reginald Carr, and a second man that Schreiber was unable to identify, carjacked Schreiber, assaulted him, and robbed him—forcing Schreiber at gunpoint to travel from ATM machine to ATM machine, making withdrawals from his bank account. 14-449 Pet. App. (Pet. App.) 92, 95-99.

Four days after that armed robbery, respondents committed an attack on Linda Ann Walenta that resulted in Walenta's death. Pet. App. 92. They followed Walenta as she drove home from her job as an orchestra cellist. One of the respondents then approached, persuading Walenta to roll down her car window by pretending to need help—only then revealing a gun. When Walenta tried to shift her car into reverse, the assailant shot Walenta three times, with one of the bullets severing her spinal cord. Walenta survived for a time, and she provided information that assisted in the identification of respondents as the perpetrators. Less than a month after the shooting, however, she died as a result of her injuries. *Id.* at 99-101.

Three days after the shooting of Walenta, respondents brutalized five total strangers over the course of a night, through crimes that included rape, sexual assault, and robbery, followed by execution-style shootings that left four dead. Pet. App. 92, 99-110. Armed with guns, respondents broke into the Wichita home where five people were staying—Aaron S., Brad H., and Jason B., who resided there; Holly G., who was Jason B.'s girlfriend; and Heather M., a friend of Aaron S. *Id.* at 101. After forcing the five friends to

strip naked and taking their ATM cards, respondents embarked on a series of vicious sexual assaults. *Id.* at 102-108. Respondents forced the women to engage in sex acts with each other while respondents watched. *Id.* at 103. They then forced each of the men to have sex with each woman—threatening and hitting the men, and ignoring cries of pain from the forced acts. *Id.* at 103-104. Afterward, one respondent drove the home's occupants—one by one—to ATM machines in order to withdraw their funds. The other respondent remained behind, where he raped the two women in the home—at one point jabbing an object into the back of Holly G. that she believed to be a gun. After the respondent who had been driving the home occupants to ATM machines returned to the home, he raped each of the women in turn. *Id.* at 104-108.

After these assaults, respondents drove the five home occupants, all naked or partially clothed, to a soccer field—with the men transported in a car trunk. Pet. App. 108-109. Respondents made each of the five kneel in the snowy field. *Id.* at 109-110, 112. They then shot each in the back of the head, in succession. *Id.* at 110. Four died. *Id.* at 112-113, 123-124. Holly G. survived, apparently because a hairclip deflected the bullet to her head, so that the bullet fractured her skull but did not enter her brain. *Id.* at 112. After respondents left, Holly G.—now naked, barefoot, and severely injured—ran more than a mile through snow and over barbed wire fences for help. *Id.* at 110-111. Meanwhile, respondents returned to the home and ransacked it. *Id.* at 113. In addition to stealing property, they shot and killed Holly G.'s dog—apparently after beating it with a golf club. *Id.* at 113, 124.

2. a. Respondents were charged with numerous crimes. In connection with the quadruple homicide and surrounding offenses, respondents were charged with capital murder, aggravated kidnapping, aggravated robbery, aggravated burglary, rape, and a number of other crimes. In connection with the carjacking of Schreiber, respondents were charged with kidnapping, aggravated robbery, aggravated battery, and criminal damage to property. Finally, in connection with Walenta's murder, respondents were charged with first-degree felony murder. Pet. App. 92. Before the start of trial, the court denied each respondent's request that his trial be severed from that of the other respondent. *Id.* at 188-195. Respondents then proceeded to a jury trial, at which Reginald Carr was convicted on all charges. *Id.* at 92-93. Jonathan Carr was convicted on all charges related to the quadruple homicide and the felony murder of Walenta, but acquitted of the charges related to the Schreiber carjacking. *Ibid.*

b. After the trial court denied respondents' renewed requests for severance, the court held a joint penalty-phase hearing before the same jury that had heard the guilt phase of respondents' trial. Pet. App. 472. The State contended that a capital sentence was justified for each respondent based on four statutory aggravating factors: (1) each respondent knowingly and purposely killed or created a risk of death to more than one person; (2) each respondent committed the crimes to receive money or something of value; (3) each respondent committed the crimes to prevent lawful arrest or prosecution; and (4) each respondent committed the crimes in an especially heinous, atrocious, or cruel manner. *Id.* at 447-448. The State

relied solely on the evidence presented during the guilt phase to support those aggravating factors, including the testimony of Holly G., the survivor of respondents' attempted quintuple execution. *Id.* at 447.

Respondents then presented mitigation cases that substantially overlapped. Reginald Carr, who presented his case first, called a number of witnesses who testified that respondents had dysfunctional upbringings and suffered childhood traumas. See, *e.g.*, 41-A 11/5/02 Tr. 36-120 (respondents' mother); 41-B 11/5/02 Tr. 64-90 (respondents' sister). Then each respondent presented expert testimony that he possessed risk factors for antisocial behavior due to his upbringing, background, and cognitive deficiencies. See, *e.g.*, 43-A 11/7/02 Tr. 17-87 (Reginald Carr); 45A 11/12/02 Tr. 4-145; 45B 11/12/02 Tr. 4-44 (Jonathan Carr). And each offered evidence that he had engaged in some positive conduct. See, *e.g.*, 42 11/6/02 Tr. 106-121, 165-175 (Reginald Carr); *id.* at 142-145, 148-150 (Jonathan Carr).

Each emphasized parallel themes in arguments to the jury. Reginald Carr's counsel principally recounted the evidence of Reginald Carr's troubled childhood, 46 11/13/02 Tr. 145-147, 151-164, and also pointed to the evidence that Reginald Carr displayed risk factors for criminal behavior, *id.* at 149-150, 157-158. After emphasizing that Reginald Carr had "done some good things in his life" as a father, *id.* at 162, he urged jurors to "extend mercy to" Reginald Carr, *id.* at 168-169.

Jonathan Carr's counsel presented similar arguments. He stated that in assessing mitigation, jurors "needed to know" about respondents' "bad family

life," 46 11/13/02 Tr. 172, about a "history of mental illness in the family," *id.* at 174, "evidence of mental illness in Jonathan," *id.* at 175, and evidence of brain injury, *id.* at 176-177. He added that jurors could also consider as mitigating evidence Jonathan Carr's "lack of a serious criminal record prior to these offenses," his young age, *id.* at 178, and his demeanor during trial, in which Jonathan Carr had "behaved himself," "treated [his counsel] like a gentleman," and—in the sole distinction that counsel drew between the two respondents in his argument—that Jonathan Carr had "come to court every day, unlike his brother," *id.* at 179. Finally, he invoked the testimony of three character witnesses as supporting the conclusion that "there is good in this young man." *Id.* at 179-180.

Prosecutors principally argued that respondents' mitigating evidence did not outweigh the aggravating factors in respondents' case. They emphasized the heinous nature of respondents' quadruple murder, the brutal sexual assaults respondents had inflicted on their victims, and respondents' efforts to cover up their crimes. 46 11/13/02 Tr. 183-184. Prosecutors argued that respondents' acts were the product of free choice, rejecting "[p]assing blame to Mommas and Daddies" and "society." *Id.* at 183; see *id.* at 182-184, 187-189. Emphasizing that respondents knew their actions were wrong, "ma[de] choices," and displayed "[n]o empathy for these people that were shot," *id.* at 190, prosecutors argued that while jurors were free to consider "mercy" and "sympathy" in mitigation, respondents "d[id] not deserve [the jury's] sympathy" or "mercy" in light of respondents' acts, *id.* at 194-195.

c. At the close of the penalty phase, the trial court instructed the jurors to "give separate consideration

to each defendant" because "[e]ach is entitled to have his sentence decided on the evidence and law which is applicable to him." Pet. App. 567 (Instruction No. 3).

The trial court next explained the standards guiding whether a death sentence was warranted in each individual case—making plain that jurors were constrained in the evidence they could treat as aggravating. The court explained that "[t]he State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist." Pet. App. 567 (Instruction No. 4). Separate instructions for each respondent then specified the circumstances that jurors could consider as aggravating, with each instruction cautioning that jurors could "consider only those aggravating circumstances set forth in this instruction." *Id.* at 569, 572; see *id.* at 568-569, 571-572.

Additional instructions for each respondent described possible mitigating circumstances. Those instructions listed six factors identified as mitigating by the Kansas legislature, and then stated that jurors could consider as mitigation "any other factor which you find may serve as a basis for imposing a sentence of less than death." Pet. App. 571, 574; see *id.* at 569-571, 573-574. Jurors were instructed that they could consider "sympathy for a defendant" and that "[t]he appropriateness of exercising mercy" could "itself be a mitigating factor." *Id.* at 573.

d. The jury unanimously found all of the aggravating factors with respect to each respondent. Further, after unanimously finding that these aggravating factors outweighed any mitigating factors, it returned a capital sentence for each respondent on each of the

four capital-murder counts. Pet. App. 93. The trial court imposed those sentences. The court also imposed a life sentence on each respondent for the felony murder of Walenta, as well as additional terms of imprisonment on the numerous other convictions. *Ibid.*

3. a. The Supreme Court of Kansas affirmed one capital conviction for each respondent, but ordered that respondents' capital sentences on those counts be vacated, concluding that the trial judge had violated each of respondents' Eighth Amendment rights by conducting a joint penalty-phase proceeding. Pet. App. 44, 50, 94, 530. The court began by stating that the Eighth Amendment "requires the jury to make an individualized sentencing determination" with respect to each capital defendant. *Id.* at 472. While disclaiming a holding that this requirement "categorically mandate[d]" the severance of capital-sentencing proceedings, the court concluded that each of the respondents had been deprived of the necessary individualized determination. *Ibid.*

In reaching this holding as to Reginald Carr, the Supreme Court of Kansas relied on aspects of Jonathan Carr's mitigation case that it saw as "antagonistic" to Reginald Carr. Pet. App. 473. The court identified occasions when Jonathan Carr invoked "mitigation evidence on behalf of J. Carr * * * to differentiate between his and R. Carr's levels of moral, not legal, culpability." *Ibid.* And it pointed to testimony elicited by Jonathan Carr from his sister, Temica Harding—whom Reginald Carr called as a witness—suggesting that Reginald Carr admitted to her that he

fired the shots in the quadruple homicides. *Id.* at 475.[3] The court suggested that Reginald Carr was deprived of an individualized sentencing determination because jurors might have treated the "antagonistic" evidence and argument as relevant to whether to find "mercy" as a mitigating factor in Reginald Carr's case and whether to reject a capital sentence for Reginald Carr on that ground. See *id.* at 474-476.

The Supreme Court of Kansas also suggested that this partially antagonistic evidence violated Reginald Carr's Eighth Amendment rights because jurors could have treated it "as improper, nonstatutory aggravating evidence against" Reginald Carr. Pet. App. 477. The court acknowledged that jurors would have violated the trial court's instructions if they used Jonathan Carr's evidence in this way. *Ibid.* Nevertheless, the court held that "this is a rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic." *Ibid.* This was the case, the court wrote, because "[i]n view of the defendants' joint upbringing in the maelstrom that was their family and their influence on and interactions with one another, including testimony that tended to show that R. Carr was a corrupting influence on J. Carr, the penalty phase evidence simply was not amenable to orderly separation and analysis." *Ibid.*; see

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[3] The Supreme Court of Kansas did not suggest that Temica Harding's statements were themselves inadmissible in Reginald Carr's sentencing. Pet. App. 475-476. Rather, it stated that it was "not satisfied that this testimony inevitably would have been admitted in a severed penalty phase" simply because the State might have been unaware of Reginald Carr's statements to Temica Harding. *Ibid.*

id. at 479 (citing "hopelessly tangled interrelationship of the mitigation cases").

In a much briefer separate opinion, the Supreme Court of Kansas concluded that Jonathan Carr was also denied individualized consideration, in violation of the Eighth Amendment, by the joint penalty-phase proceeding. Pet. App. 50. The court stated that Jonathan Carr was prejudiced "for reasons explained in * * * the R. Carr opinion and because of the family circumstances argument raised by J. Carr." *Id.* at 45. It added that it also "relie[d] on the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase."[4] *Ibid.*

Finally, the Supreme Court of Kansas concluded that the Eighth Amendment violation it found was not harmless as to either respondent. Pet. App. 478-480. In view of "[t]he evidence that was admitted," including Temica Harding's statements and the related mitigation cases, the court wrote that it could not "say that the death verdict was unattributable, at least in part" to the failure to sever that the court had found to be an Eighth Amendment violation. *Id.* at 479. The court accordingly ordered two new sentencing hearings, adding that the hearings should not be held before the same jury.[5] *Id.* at 478-480.

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[4] Reginald Carr was handcuffed during trial following behavior the trial court considered a security risk. See 171 10/17/02 Tr. 97-98. During the guilt phase, he wore a sweater that concealed the handcuffs from the jury's view. During the penalty phase, however, he declined to wear the sweater. Pet. App. 447; see 41-A 11/5/02 Tr. 7.

[5] The Supreme Court of Kansas found two additional constitutional violations had occurred in the sentencing proceeding. The court found an additional Eighth Amendment violation based on jury instructions that did not expressly tell jurors they could

b. Justice Moritz dissented from the Eighth Amendment holding, Pet. App. 551-563, "disagree[ing] with essentially every step of the majority's analysis," *id.* at 553. First, Justice Moritz rejected the majority's suggestion that Reginald Carr was deprived of an individualized sentencing determination because a "minor theme" in Jonathan Carr's mitigation case was "antagonistic" to Reginald Carr. *Id.* at 555. Justice Moritz explained that *Zafiro* v. *United States*, 506 U.S. 534, 538-539 (1993), undercut the proposition that any "antagonis[m]" deprived co-defendants of an individualized adjudication. Pet. App. 552. Justice Moritz noted that the majority cited no authority—and that she was aware of none—supporting its apparent contrary conclusion that because of "some antagonistic evidence pertaining to moral culpability, Reginald Carr's death sentence violates the Eighth Amendment's individualized sentencing requirement." *Id.* at 555. Justice Moritz found equally unsupported "the majority's implication that because" the State "*might* not have" elicited from Temica Harding that Reginald Carr had made statements implicating himself as the quadruple-homicide shooter, those statements' "admission in a joint trial somehow rose to the level of a constitutional violation." *Ibid.*

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consider mitigating factors not proven beyond a reasonable doubt—an omission the court concluded could have prevented the jury "from giving meaningful effect or a reasoned moral response to mitigating evidence." Pet. App. 512 (internal quotation marks omitted) (relying on *State* v. *Gleason*, 329 P.3d 1102 (Kan. 2014) (per curiam), cert. denied, 135 S. Ct. 1183, and cert. granted, 135 S. Ct. 1698 (2015)). The court also concluded that the use of certain evidence at sentencing had violated respondents' Confrontation Clause rights. *Id.* at 487-490.

At the next step, Justice Moritz concluded, the majority erred in finding that the jury might have improperly treated the "antagonistic" evidence as establishing nonstatutory aggravating factors, even though the jury was correctly instructed on the aggravating factors it could consider for each respondent. Pet. App. 556. Justice Moritz wrote that the majority's assertion that the case "present[s] the 'rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic,'" was unsupported, with the majority "oddly fail[ing] to explain the 'logic' to which that solid presumption gives way." *Ibid.* (citation omitted).

Finally, Justice Moritz "strongly disagree[d] with the majority's conclusory, one-paragraph harmless-error analysis." Pet. App. 557. She faulted the majority for failing to consider, as harmless-error analysis requires, "whether the court is able to find beyond a reasonable doubt that the error, *viewed in the light of the record as a whole*, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances." *Id.* at 557-558. She recounted the "overwhelming and convincing evidence of heinous and atrocious acts" the jury heard—particularly through the testimony of Holly G.—while noting it was "nearly impossible" to fully convey the horror of respondents' acts. *Id.* at 559-560. Had the majority performed the requisite harmless-error analysis, she wrote, "I do not believe it could arrive at any conclusion other than that the severance error, if any, had little, if any, likelihood of changing the jury's ultimate conclusion." *Id.* at 563.

SUMMARY OF ARGUMENT

The joint penalty phase of respondents' capital trial complied with the Eighth Amendment.

A. 1. Joint trials have been recognized as a fair means of adjudicating criminal cases, including capital cases, since the Founding Era. That history reflects that joint trials "serve the interests of justice," including accuracy, fairness, and efficiency. *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993). As to accuracy, joint trials enhance jurors' ability "to assign fairly the respective responsibilities of each defendant in sentencing" by providing "a more complete view" of the relevant acts "than would be possible in separate trials." *Buchanan* v. *Kentucky*, 483 U.S. 402, 418 (1987). As to fairness, joint trials "avoid[] the scandal and inequity of inconsistent verdicts" that can result from severed trials. *Zafiro*, 506 U.S. at 537. And as to efficiency, joint trials conserve public resources and spare victims the hardship of repeated trials. *Buchanan*, 483 U.S. at 417.

Critically, in upholding joint trials, this Court has rejected attacks on their general accuracy and fairness. It has explained that a defendant is not denied a fair and accurate adjudication simply because a co-defendant at a joint trial offers an "antagonistic" defense. *Zafiro*, 506 U.S. at 538. And it has explained that jurors can make reliable judgments about individual defendants in joint proceedings, even if jurors are exposed to evidence that is properly considered as to one defendant, but not as to others. *Id.* at 539. Trial judges may rely on limiting instructions to ensure that each defendant is judged based only on the evidence relevant and admissible as to him, in light of the "almost invariable" presumption that jurors follow

their instructions. *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987).

2. Neither the Eighth Amendment nor any other constitutional provision bars trial judges in capital cases from exercising their traditional discretion to conduct joint proceedings. The Eighth Amendment's baseline requirements are ones that Kansas's death-penalty statute satisfies: Capital-sentencing procedures must narrow the class of eligible offenders and permit jurors to consider any mitigating evidence. See *Kansas* v. *Marsh*, 548 U.S. 163, 175 (2006).

Beyond these requirements, capital-sentencing decisions, like all sentencing decisions, must be based on relevant evidence, not prejudicial and extraneous considerations. But this Court's joinder precedents establish that joint sentencing proceedings are compatible with this requirement in all but exceptional circumstances, as a result of the presumption that jurors will follow instructions concerning the evidence they may consider with respect to each defendant. This Court has consistently applied that presumption in capital cases.

Heightened constraints on joinder in capital-sentencing proceedings could undercut the aims of accuracy and fairness that are entitled to weight in the Eighth Amendment context. Because the presentation of additional evidence and argument enables jurors to obtain "a more complete view of all the acts underlying the charges than would be possible in separate trials," and "to assign fairly the respective responsibilities of each defendant," *Buchanan*, 483 U.S. at 418, joint trials often enhance jurors' ability to make accurate individualized judgments based on the "defendant's record, personal characteristics, and the

circumstances of his crime," *Marsh*, 548 U.S. at 174. In addition, because joint trials avoid the "scandal and inequity of inconsistent verdicts," *Richardson*, 481 U.S. at 210, they can help ensure that capital punishment is "not arbitrary or capricious in its imposition," *Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998).

B. The trial court did not deprive respondents of individualized sentencing determinations in violation of the Eighth Amendment or any other constitutional guarantee by holding a joint sentencing proceeding in this case. The aggravating and mitigating evidence pertaining to each respondent was essentially parallel. As a result, the joint proceeding afforded benefits of accuracy, fairness, and efficiency, but resulted in the presentation of little to no evidence that could be improperly considered as to either respondent.

This Court's precedents refute the Supreme Court of Kansas's suggestion that separate penalty proceedings were nonetheless constitutionally required because respondents' penalty-phase evidence diverged in some ways. The Kansas court principally suggested that Reginald Carr was entitled to a severance because, although respondents' defenses were largely parallel, Jonathan Carr offered some evidence that was "antagonistic" to Reginald Carr. This Court's cases, however, establish that a defendant is not deprived of a fair or accurate adjudication simply because a co-defendant offers some harmful evidence or argument at a joint trial. Nor was severance required because jurors might have treated Jonathan Carr's mitigating evidence "as improper, nonstatutory aggravating evidence" against Reginald Carr. Pet. App. 477. Jurors were correctly instructed on the aggravating factors they could consider, and they are "pre-

sumed to follow their instructions." *Zafiro*, 506 U.S. at 540.

Finally, the Supreme Court of Kansas was mistaken in holding that Jonathan Carr was deprived of an individualized sentencing determination by the joint proceedings. The court principally relied on the same reasons it had offered with respect to Reginald Carr. Those reasons were mistaken, but even if Reginald Carr could claim injury from Jonathan Carr's "antagonistic" evidence, Jonathan Carr could not claim injury from evidence he himself offered.

ARGUMENT

THE JOINT PENALTY PHASE OF RESPONDENTS' CAPITAL TRIAL COMPLIED WITH THE EIGHTH AMENDMENT

A. The Eighth Amendment Allows States To Give Trial Courts Wide Discretion To Conduct Joint Penalty Proceedings In Capital Trials

1. Joint trials have long been recognized as a fair means of adjudicating criminal cases, including cases involving capital offenses. This Court "repeatedly ha[s] approved of" joinder in an unbroken line of cases dating back to the Founding Era. *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993). First, in *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480 (1827), a capital case, Justice Story explained for the Court that a federal defendant had no right to a severance, relying in part on the absence of any historical support for such a right in common-law sources. *Id.* at 486 (concluding that "two or more persons" who "are jointly charged in the same indictment, * * * have not a right, by the laws of the country, to be tried severally, separately, and apart, the counsel for the United

States objecting thereto; but * * * such separate trial is a matter to be allowed in the discretion of the Court before whom the indictment is tried"). Since *Marchant*, courts have so frequently upheld joint trials that this Court has described the practice of joinder as "too well established to require further consideration," and has stated that "no question" exists that trial courts have the discretion to order joint trials. *Stilson* v. *United States*, 250 U.S. 583, 585-586 (1919); see *United States* v. *Ball*, 163 U.S. 662, 672 (1896) ("[T]he question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below."); see also *Buchanan* v. *Kentucky*, 483 U.S. 402, 416-420 (1987); *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

This unbroken practice reflects the principle that joint trials "serve the interests of justice." *Zafiro*, 506 U.S. at 537. First, this Court has explained, joint trials of those charged with the same offense generally enhance the accuracy of verdicts. By affording jurors "a more complete view of all the acts underlying the charges than would be possible in separate trials," they enhance jurors' ability "to assign fairly the respective responsibilities of each defendant in the sentencing" and at the guilt phase of a trial. *Buchanan*, 483 U.S. at 418; see *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987) (joint trials "serve the interests of justice by * * * enabling more accurate assessment of relative culpability"). Second, having a single jury consider the evidence pertaining to a single offense enhances fairness, "by avoiding the scandal and inequity of inconsistent verdicts" that can result from severed trials. *Zafiro*, 506 U.S. at 537 (citation omitted); see *Buchanan*, 483 U.S. at 418; *Richardson*, 481

U.S. at 210. Joint trials also avoid the unfairness of conferring a "random[]" strategic benefit on one defendant over another charged with precisely the same offenses—by allowing the later-tried defendant a free preview of the State's case. *Richardson*, 481 U.S. at 210. Finally, substantial societal interests counsel against the needless duplication of resources that occurs when separate trials for the same acts force the State to "present[] the same evidence again and again." *Ibid.*; see *Buchanan*, 483 U.S. at 417. They include not only the public's interest in conservation of state resources, but also the interests of victims and witnesses, who may be forced in severed trials to repeatedly relive horrific crimes. See *Richardson*, 481 U.S. at 210 (noting that forcing victims and others to repeatedly testify may result not simply in "inconvenience" but "trauma").

These benefits make it unsurprising that federal and state authorities have adopted rules preferring joinder in both capital and non-capital cases. The federal rules express a "preference * * * for joint trials of defendants who are indicted together," with severance appropriate "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 537, 539; see Fed. R. Crim. P. 8, 14. Consistent with historic practice, see *Marchant*, 25 U.S. (12 Wheat.) at 486, the decision whether to address a risk of prejudice through severance, a limiting instruction, or another remedy is left "to the sound discretion of the district courts," *Zafiro*, 506 U.S. at 541. Applying that framework, federal district courts regularly conduct joint sentencing hearings

when two defendants are charged with the same capital offense.[6] States that authorize capital punishment largely also follow liberal joinder rules, and rarely provide under state law that capital proceedings should receive different treatment.[7]

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[6] Joint penalty-phase proceedings for multiple defendants have been held in 19 capital trials since 2000, as set forth in Appendix A to this brief. The government has identified 16 capital trials during that time in which district courts exercised their discretion to grant a severance of capital defendants at either the guilt or penalty phase, as set forth in Appendix B to this brief. Courts of appeals have uniformly upheld district court decisions denying severance of joint penalty proceedings. See *United States* v. *Snarr*, 704 F.3d 368, 395-398 (5th Cir. 2013), cert. denied, 134 S. Ct. 1273, and 134 S. Ct. 1274 (2014); *United States* v. *Bernard*, 299 F.3d 467, 475-476 (5th Cir. 2002), cert. denied, 539 U.S. 928 (2003); *United States* v. *Tipton*, 90 F.3d 861, 892-893 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997); see also *Puiatti* v. *McNeil*, 626 F.3d 1283, 1309-1318 (11th Cir. 2010), cert. denied, 131 S. Ct. 3068 (2011).

[7] See Ala Ct. R. Crim. P. 13.4(a) (2014); Ariz. Ct. R. Crim. P. 13.4(a) (2014); Ark. Ct. R. Crim. P. 22.3 (2014); Cal. Penal Code § 1098 (West 2004): Colo. Ct. R. Crim. P. 14 (2015); Del. Super. Ct. R. Crim. P. 14 (2014); Fla. R. Crim. P. 3.152 (2007); Idaho Ct. Crim. R. 14 (2014); Ind. Code Ann. § 35-34-1-11 (LexisNexis 2012); Ky. Ct. R. Crim. P. 8.31 (2015); La. Code Crim. Proc. Ann. art. 704 (2003); Mo. R. Crim. P. 24.06 (2002); Mont. Code Ann. § 46-13-211 (2013); Nev. Rev. Stat. Ann. § 174.165 (LexisNexis 2011); N.C. Gen. Stat. § 15A-927 (2013); Or. Rev. Stat. § 136.060 (2013); Pa. Ct. R. Crim. P. 583 (2015); S.D. Codified Laws § 23A-11-2 (2004); Tenn. Ct. R. Crim. P. 14 (2014); Tex. Code Crim. Proc. Ann. art 36.09 (West 2007); Va. Code Ann. § 19.2-262.1 (2008); Wash. Super. Ct. Crim. R. 4.4 (2014): Wyo. Ct. R. Crim. P. 14 (2014). In contrast, two States require as a matter of state law that courts grant defendants' requests for severance in capital proceedings, Ga. Code Ann. § 17-8-4 (2013); *Smith* v. *State*, 729 So. 2d 1191, 1202-1203 (Miss. 1998) (en banc), cert. denied, 527 U.S. 1043 (1999), and a third State provides that capital defendants should generally be tried separately, Ohio Rev. Code Ann. § 2945.20 (LexisNexis 2014);

Critically, this Court has rejected claims that joinder, as a general matter, impedes the fairness or accuracy of joint proceedings. In *Zafiro*, it turned back the claim of defendants who argued they would not receive fair trials in joint proceedings because each of their defenses would be harmed by evidence or argument presented in "antagonistic" defenses of their co-defendants. 506 U.S. at 536-537. This Court agreed that under the federal rules, "a district court should grant a severance" if a "serious risk" exists that joinder would "prevent the jury from making a reliable judgment about guilt or innocence" or would compromise any other "specific trial right." *Id.* at 539. But it rejected any claim that "[m]utually antagonistic defenses" in themselves violate a fair-trial right. *Id.* at 538. On the contrary, in keeping with cases that have recognized that joint trials enhance accuracy by placing additional information before a jury, see, *e.g.*, *Buchanan*, 483 U.S. at 418, the Court explained that a defendant suffers no cognizable harm simply because a co-defendant places before the jury admissible facts or argument relevant to the jury's determination. While a fair trial requires "that a jury consider *only* relevant and competent evidence bearing on the issue of guilt or innocence," it does not "include the right to exclude relevant and competent evidence." *Zafiro*, 506 U.S. at 540 (citation omitted).

Equally critically, this Court rejected the argument that jurors will be prevented "from making a reliable judgment about guilt or innocence," *Zafiro*, 506 U.S. at 539, if they hear evidence in a joint trial that is properly considered only as to one of several defend-

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State v. *Coleman*, 544 N.E.2d 622, 629 (Ohio 1989), cert. denied, 493 U.S. 1051 (1990).

ants. The Court acknowledged that if the jury impermissibly considered such evidence as to a second defendant, it would compromise that defendant's right to accurate jury determinations based on the evidence admissible against him. *Ibid.* (explaining that risk of prejudice "might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant," such as "[e]vidence that is probative of a defendant's guilt but technically admissible only against a codefendant"). But it explained that trial courts have "less drastic" remedies than severance available to address the risk of such prejudice, including limiting instructions to the jury. *Ibid.* The Court wrote that a trial court, in its "sound discretion," was more likely to choose a severance remedy than a limiting instruction "[w]hen the risk of prejudice is high," but that limiting instructions "often will suffice to cure any risk of prejudice." *Ibid.*; see *id.* at 540 ("[J]uries are presumed to follow their instructions.") (citation omitted).

A century of cases bolster *Zafiro*'s recognition that trial courts may, in their discretion, properly rely on limiting instructions to ensure that each defendant in a joint proceeding is judged based only on the evidence relevant and admissible as to him. This Court has treated instructions as sufficient for that purpose since as early as 1896, *Ball*, 163 U.S. at 672, and has rejected attacks on the adequacy of such instructions, explaining that "[o]ur theory of trial rests upon the ability of a jury to follow instructions," *Opper*, 348 U.S. at 95. Indeed, this presumption is "almost invariable," applying in "many varying contexts" throughout the criminal law. *Richardson*, 481 U.S. at 206.

While this Court has recognized exceptions for limited classes of evidence so "powerfully incriminating" that a jury could not be expected to set the evidence aside, *Bruton* v. *United States*, 391 U.S. 123, 135 (1968), these are "narrow," leaving the presumption in place even when it requires jurors to disregard evidence that is very incriminating, *Richardson*, 481 U.S. at 207; see *id.* at 206-207 (cataloging examples).

2. The accuracy and fairness benefits of joint proceedings apply equally in the capital context. And nothing in the Eighth Amendment or any other constitutional provision bars trial courts from generally exercising discretion to conduct joint proceedings in capital cases—as courts have done since the Founding Era, see *Marchant*, 25 U.S. (12 Wheat.) at 486.

The Eighth Amendment imposes two principal restraints on capital sentencing, beyond which legislatures have flexibility in determining the appropriate procedures for adjudicating capital offenses. See, *e.g.*, *Kansas* v. *Marsh*, 548 U.S. 163, 173-175 (2006) (noting legislatures' flexibility). First, to ensure that the administration of the death penalty is not arbitrary, the sentencer must be guided by limiting criteria that "genuinely narrow the class of persons eligible for the death penalty and * * * reasonably justify the imposition of a more severe sentence." *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983). Second, because a death sentence must reflect a "reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime," the Eighth Amendment requires defendants to be able to submit, and sentencers to consider, mitigation evidence. *Marsh*, 548 U.S. at 174. Specifically, the Eighth Amendment

"require[s] that the sentencer not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Ibid.* (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.)). This Court has held that the Kansas death-penalty statute satisfies these constitutional requirements. *Id.* at 175.

Capital-sentencing decisions, like all sentencing decisions, must be based on relevant evidence, not on prejudicial and extraneous considerations that are not properly used by the sentencer against a particular defendant.[8] But this Court's joinder precedents establish that joint sentencing proceedings are compatible with this requirement in all but exceptional circumstances. It is possible that in a joint sentencing proceeding, like a joint trial, jurors may hear evidence relevant to one defendant that is not appropriately considered in making an individualized sentencing

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[8] The view of the Supreme Court of Kansas that this principle follows from the Eighth Amendment's individualized-consideration requirement is open to question. This Court's cases treat the individualized-consideration requirement as an *inclusionary* principle, not an *exclusionary* one. See, *e.g.*, *Marsh*, 548 U.S. at 175-176 (explaining that the Kansas capital-sentencing statute fully complied with individualized-consideration requirement because it provided that jurors may "consider *any* evidence relating to *any* mitigating circumstance in determining the appropriate sentence for a capital defendant, so long as that evidence is relevant"). This Court has indicated, however, that the introduction of irrelevant evidence in a capital-sentencing proceeding would violate the Due Process Clause if the evidence's introduction "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Romano* v. *Oklahoma*, 512 U.S. 1, 12 (1994).

determination with respect to another. But trial courts may instruct jurors on the evidence that can be considered with respect to each defendant, and juries are presumed to follow these instructions. See *Zafiro*, 506 U.S. at 539-541. Accordingly, absent unusual circumstances, a joint proceeding will not interfere with a defendant's right to individualized sentencing determination based on his own "record, personal characteristics, and the circumstances of his crime." *Marsh*, 548 U.S. at 174.

Nothing about the capital context renders *Zafiro*'s reasoning inapplicable. This Court has treated the presumption that jurors follow their instructions as applicable "in all cases," *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838, 841 (2009) (per curiam)—including capital cases, see, *e.g.*, *Blueford* v. *Arkansas*, 132 S. Ct. 2044, 2051 (2012); *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000); *Jones* v. *United States*, 527 U.S. 373, 394 (1999); *Romano* v. *Oklahoma*, 512 U.S. 1, 13 (1994). As the Court has explained, "[j]urors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions." *Hensley*, 556 U.S. at 841. The only exceptions have been "narrow" ones involving evidence so vividly and directly inculpatory that jurors simply could not be expected to follow an instruction to set the evidence aside. *Richardson*, 481 U.S. at 207-208 (describing the exception in *Bruton*, 391 U.S. at 135-136, for the "powerfully incriminatory" confession of one defendant that implicates a co-defendant at a joint trial). Because jurors presumptively follow their instructions in capital and non-capital cases alike, severance is not required in capital cases to

ensure that defendants receive appropriate individualized consideration.

Indeed, heightened constraints on joinder in the capital context could undercut objectives of accuracy and fairness entitled to weight under the Eighth Amendment. The Eighth Amendment's individualized sentencing objectives are served by rules permitting "the jury to have as much information before it as possible when it makes the sentencing decision," and to hear "open and far-ranging argument." *Gregg* v. *Georgia*, 428 U.S. 153, 203-204 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Because the presentation of additional argument in joint sentencing proceedings enables jurors to obtain "a more complete view of all the acts underlying the charges than would be possible in separate trials" and "to assign fairly the respective responsibilities of each defendant," *Buchanan*, 483 U.S. at 418, joint trials will often *enhance* jurors' ability to make accurate and reasoned judgments as to individual defendants based on evidence of the "defendant's record, personal characteristics, and the circumstances of his crime," *Marsh*, 548 U.S. at 174.

Second, heightened constraints on joinder in the capital context would risk undercutting the Eighth Amendment's objective of avoiding arbitrarily different treatment of similarly situated capital defendants. See *Gregg*, 428 U.S. at 188 (opinion of Stewart, Powell, and Stevens, JJ.) (explaining Court's rejection of highly discretionary scheme because it was impermissible for the death penalty to be imposed "wantonly" and "freakishly" on some defendants, while it was not imposed on others "just as reprehensible") (quoting *Furman* v. *Georgia*, 408 U.S. 238, 309-310 (1972) (Stewart,

J., concurring)); *Buchanan* v. *Angelone*, 522 U.S. 269, 275-276 (1998) (describing safeguards Court has required to ensure that capital punishment is "not arbitrary or capricious in its imposition"). As this Court has explained, joint trials are themselves a means of protecting against arbitrarily inconsistent treatment of similarly situated defendants. *Richardson*, 481 U.S. at 210. By enabling a single sentencer to consider the evidence against multiple participants in a single capital crime, joinder helps ensure that those participants are not treated differently for reasons wholly unrelated to their conduct or character—simply because separate fact-finders place greater or lesser weight on shared aggravating factors or jointly applicable evidence in mitigation. The Eighth Amendment does not forbid legislatures from allowing trial judges wide discretion in capital cases to order joint proceedings.

B. The Trial Court's Decision To Conduct A Joint Penalty Proceeding Did Not Violate Respondents' Eighth Amendment Rights

The trial court did not deprive respondents of individualized sentencing determinations in violation of the Eighth Amendment or any other constitutional guarantee by holding a joint sentencing proceeding in this case. Since the aggravating and mitigating evidence pertaining to each respondent was largely parallel, the court's decision to conduct joint proceedings afforded benefits of accuracy, fairness, and efficiency, but resulted in presentation of little to no evidence that could be improperly considered as to either respondent. As aggravation, the State relied solely on trial evidence equally relevant to each respondent—evidence of the heinous murders, rapes, sexual as-

saults, and robberies that respondents committed together. And in mitigation, respondents presented arguments that were largely complementary. Each respondent emphasized the hardships of respondents' joint upbringing. And each obtained expert testimony to suggest that factors beyond their control—family background, psychological impairments, and other circumstances—placed them at risk for committing criminal acts. These parallel cases present paradigmatic circumstances in which joinder enhances fairness, accuracy, and efficiency. A joint penalty proceeding avoided arbitrariness from different juries assigning different weights to common evidence; provided jurors with a fuller picture of the common family and childhood circumstances on which each respondent relied; and spared the public and the State's witnesses the need to repeat—before a newly empaneled second sentencing jury—evidence already presented at a lengthy trial.

This Court's precedents refute the Supreme Court of Kansas's suggestion that the ways in which respondents' penalty-phase evidence diverged required the trial court to forgo the benefits of a joint penalty proceeding. With respect to Reginald Carr, the Kansas court principally suggested that severance was constitutionally required because Jonathan Carr offered some relevant evidence that was "antagonistic" to the mitigation case of Reginald Carr, Pet. App. 472-477, even though "most of the two brothers' mitigating evidence was not antagonistic," *id.* at 555 (Moritz, J., concurring in part and dissenting in part). But because "[m]utually antagonistic defenses are not prejudicial *per se*," *Zafiro*, 506 U.S. at 538, a defendant is not deprived of a fair trial simply because of some

antagonism between co-defendants' cases. A co-defendant's additional relevant evidence placed before the jury, this Court has explained, simply does not undermine the fairness of the other defendant's trial. See *id.* at 540 (noting that "a fair trial does not include the right to exclude relevant and competent evidence").[9]

The Supreme Court of Kansas erred equally in concluding that Reginald Carr was deprived of an individualized sentencing determination because jurors might have treated mitigating evidence offered by Jonathan Carr "as improper, nonstatutory aggravating evidence against" Reginald Carr. Pet. App. 477. That speculation was error, because jurors are

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[9] The Supreme Court of Kansas treated the "antagonistic" evidence in this case as prejudicial to Reginald Carr precisely because the evidence would have been relevant, at a minimum, to jurors' determination of whether to find as a mitigating factor that Reginald Carr was deserving of mercy. Pet. App. 472-476. But evidence that differentiates "the *moral* culpability of two defendants * * * in a joint trial" and that may determine "whether a juror decides to show mercy to one while refusing to show mercy to the other," *id.* at 474-475 (citing *State* v. *Kleypas*, 40 P.3d 139, 281 (Kan. 2001) (per curiam), cert. denied, 537 U.S. 834 (2002)), creates no constitutional concern. Indeed, so long as it is admissible, such evidence improves the fairness and accuracy of the proceedings by enhancing a jury's ability to make a reasoned and consistent moral judgment. And the court did not suggest that "antagonistic" statements elicited by Jonathan Carr would have been barred by any other evidentiary rule applicable to Kansas capital sentencings. See Kan. Stat. Ann. § 21-6617(c) (Supp. 2013) (during penalty phase, "[a]ny * * * evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence"). In any event, given the relatively small role of these statements in the overall conduct of the hearing, on no analysis can they be said to have "infected the sentencing proceeding with unfairness." *Romano*, 512 U.S. at 12.

properly presumed to have followed the trial court's instructions on the exclusive list of factors that could be considered as aggravation. *Zafiro*, 506 U.S. at 540; see Pet. App. 568-569 (listing aggravating factors and specifying that "[i]n your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction"). Indeed, this Court has previously applied the presumption that jurors are presumed to follow their instruction in an analogous case, where it reasoned that because jurors had been instructed that they could only consider particular circumstances as aggravating, jurors would not have used evidence unrelated to those factors as improper aggravation. *Romano*, 512 U.S. at 13. The Supreme Court of Kansas offered no evidence in this case sufficient to displace the "almost invariable" principle that jurors follow their instructions. *Richardson*, 481 U.S. at 206. The court cited the interrelated nature of respondents' mitigation evidence concerning their "joint upbringing in the maelstrom that was their family and their influence on and interactions with one another." Pet. App. 477. But there is no reason why overlap between respondents' mitigation evidence would have prevented jurors from treating as aggravating only the distinct facets of respondents' crimes that were enumerated in the jury instructions.

The Supreme Court of Kansas likewise erred in concluding that joint proceedings deprived Jonathan Carr of an individualized sentencing determination. The court principally wrote that it found a violation of Jonathan Carr's right to an individualized sentencing determination "for reasons explained in * * * the R. Carr opinion." Pet. App. 45. But as noted above, the

court's reasoning in Reginald Carr's case was incorrect. And even if the court had been correct that Reginald Carr was unfairly prejudiced by Jonathan Carr's introduction of "antagonistic" evidence, that would not establish unfair prejudice to Jonathan Carr, who *offered* the antagonistic evidence.[10]

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
JAMES I. PEARCE
Attorney

JUNE 2015

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[10] The Supreme Court of Kansas added that it also "relie[d] on the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase." Pet. App. 45. But while visible shackles can "impl[y] to a jury, as a matter of common sense, that court authorities consider" the shackled defendant to be "a danger to the community," *Deck* v. *Missouri*, 544 U.S. 622, 633 (2005), visible shackles on one defendant do not naturally imply that court authorities considered an *unshackled* co-defendant to be a danger. On the contrary, the contrasting treatment more naturally suggests that authorities did not regard the unshackled defendant as a danger. Cf. 46 11/13/02 Tr. 179 (Jonathan Carr's counsel drawing attention to contrast between brothers' courtroom conduct, asking jurors to consider in mitigation that Jonathan Carr had "behaved himself" and had "come to court every day, unlike his brother").

APPENDIX A

Federal Capital Trials Involving Joint Penalty-Phase Proceedings

1. *United States* v. *Coonce*, No. 10-CR-03029 (W.D. Mo. 2014) (Wesley Paul Coonce, Jr. and Charles Michael Hall);

2. *United States* v. *Salad*, No. 11-CR-00034 (E.D. Va. 2012) (Ahmed Muse Salad, Abukar Osman Beyle, and Shani Nurani Shiekh Abrar);

3. *United States* v. *Snarr*, No. 09-CR-00015 (E.D. Tex. 2009) (Mark Isaac Snarr and Edgar Baltazar Garcia);

4. *United States* v. *Mills*, No. 02-CR-00938 (C.D. Cal. 2007) (Wayne Bridgewater and Henry Michael Houston);

5. *United States* v. *Dinkins*, No. 06-CR-00309 (D. Md. 2009) (James Dinkins and Melvin Gilbert);

6. *United States* v. *Varela*, No. 06-CR-80171 (S.D. Fla. 2009) (Ricardo Sanchez, Jr. and Daniel Troya);

7. *United States* v. *Lecco*, No. 05-CR-00107 (S.D. W. Va. 2007) (George M. Lecco and Valerie Friend);

8. *United States* v. *Mikhel*, No. 02-CR-00220 (C.D. Cal. 2007) (Iouri Mikhel and Jurijus Kadamovas);

9. *United States* v. *Mills*, No. 02-CR-00938 (C.D. Cal. 2006) (Barry Byron Mills and T.D. Bingham);

10. *United States* v. *Williams*, No. 01-CR-00512 (E.D. Pa. 2006) (Vincent Williams, Jamain Williams, and Andre Cooper);

11. *United States* v. *James*, No. 02-CR-00778 (E.D.N.Y. 2005) (Richard James and Ronald Mallay);

12. *United States* v. *Rivera*, No. 04-CR-00283 (E.D. Va. 2005) (Oscar Antonio Grande and Ismael Juarez Cisneros);

13. *United States* v. *Williams*, No. 00-CR-01008 (S.D.N.Y. 2005) (Elijah Bobby Williams and Reverend Michael Williams);

14. *United States* v. *Quinones*, No. 00-CR-00761 (S.D.N.Y. 2004) (Alan Quinones and Diego B. Rodriguez);

15. *United States* v. *Breeden*, No. 03-CR-00013 (W.D. Va. 2004) (Shawn Arnette Breeden and Michael Anthony Carpenter);

16. *United States* v. *Foster*, No. 02-CR-00410 (D. Md. 2004) (Keon Moses and Michael Lafayette Taylor);

17. *United States* v. *Matthews*, No. 00-CR-00269 (N.D.N.Y. 2003) (Lavin Matthews and Tebiah Shelah Tucker);

18. *United States* v. *Gray*, No. 00-CR-00157 (D.D.C. 2003) (Kevin L. Gray and Rodney L. Moore);

19. *United States* v. *Vialva*, No. 99-CR-00070 (W.D. Tex. 2000) (Christopher Andre Vialva and Brandon Bernard).

APPENDIX B

Federal Capital Trials Involving Severed Guilt- Or Penalty-Phase Proceedings

1. *United States* v. *Lewis*, No. 07-CR-00550 (E.D. Pa. 2013) (Steven Northington and Kaboni Savage);

2. *United States* v. *Eye*, No. 05-CR-00344 (W.D. Mo. 2008) (Gary Eye and Steven Sandstrom);

3. *United States* v. *Sablan*, No. 00-CR-00531 (D. Colo. 2006) (William Concepcion Sablan and Rudy Cabrera Sablan);

4. *United States* v. *Caraballo*, No. 01-CR-01367 (E.D.N.Y. 2005) (Gilberto Caraballo and Martin Aguilar);

5. *United States* v. *Johnson*, No. 04-CR-00017 (E.D. La. 2005) (John Johnson and Herbert Jones, Jr.);

6. *United States* v. *Catalan-Roman*, No. 02-CR-00117 (D.P.R. 2005) (Lorenzo Vladimir Catalan-Roman and Hernardo Medina-Villegas);

7. *United States* v. *Payne*, No. 98-CR-00038 (M.D. Tenn. 2004) (Eben Payne, Jamal Shakir, and Donnell Young);

8. *United States* v. *Fulks*, No. 02-CR-00992 (D.S.C. 2004) (Chadrick E. Fulks and Branden L. Basham);

9. *United States* v. *Perez*, No. 02-CR-00007 (D. Conn. 2004) (Wilfredo Perez and Fausto Gonzalez);

10. *United States* v. *Ostrander*, No. 01-CR-00218 (W.D. Mich. 2003) (Robert Norman Ostrander and Michael Paul Ostrander);

11. *United States* v. *Taylor*, No. 01-cr-00073 (N.D. Ind. 2003) (Styles Taylor and Keon Thomas);

12. *United States* v. *Hyles*, No. 01-CR-00073 (E.D. Mo. 2003) (Tyrese D. Hyles and Amesheo D. Cannon);

13. *United States* v. *Henderson*, No. 00-CR-00260 (N.D. Tex. 2002) (Julius Omar Robinson and L.J. Britt);

14. *United States* v. *Cooper*, No. 01-CR-00008 (S.D. Miss. 2002) (Billy D. Cooper and James Edward Frye);

15. *United States* v. *Hage*, No. 98-CR-01023 (S.D.N.Y. 2001) (Mohamed Rashed Daoud Al-'Owhali and Khalfan Khamis Mohamed);

16. *United States* v. *Church*, No. 00-CR-00104 (W.D. Va. 2001) (Walter Lefight Church and Samuel Stephen Ealy).

No. 14-449, 14-450, 14-452

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

JONATHAN D. CARR,
REGINALD DEXTER CARR, JR., and,
SIDNEY J. GLEASON,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF *AMICUS CURIAE* OF CRIMINAL JUSTICE LEGAL FOUNDATION, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amici Curiae

QUESTIONS PRESENTED

1. Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

2. Whether the trial court's decision not to sever the sentencing phase of the co-defendant brothers' trial here—a decision that comports with the traditional approach preferring joinder in circumstances like this—violated an Eighth Amendment right to an "individualized sentencing" determination and was not harmless in any event?

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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

JONATHAN D. CARR,
REGINALD DEXTER CARR, JR., and,
SIDNEY J. GLEASON,

Respondents..

BRIEF *AMICUS CURIAE* OF CRIMINAL JUSTICE LEGAL FOUNDATION, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to

1. All parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors; assistant prosecutors; investigators; victim witness advocates; and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutors' views as *amicus curiae* in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

In these cases, the Kansas Supreme Court has invented a new constitutional requirement never before imposed in any other state in over 40 years of litigation over capital sentencing procedure in the post-*Furman* era. Invention of such novel constitutional mandates disapproving standard practices often wipes out large numbers of just, deserved sentences imposed for

horrible crimes in accordance with the law in effect at the time of trial. Such arbitrary mass reversals are contrary to the interests of *amici*.

SUMMARY OF FACTS AND CASE

The crimes committed by brothers Jonathan and Reginald Carr are exceptionally horrible and depraved even by the standards of capital cases. These are the kinds of crimes that cause people to say that if we are going to have the death penalty at all, these are definitely the kinds of crimes that deserve it. Anything less would be a grotesque miscarriage of justice.

The Carr brothers' crime spree in December 2000 in Wichita, Kansas, began with the robbery, kidnapping, and aggravated battery of Andrew Schreiber. See *State* v. *Carr* (*Reginald*), 300 Kan. 1, 15-20, 331 P. 3d 544, 573-576 (2014). Next they attempted to rob Linda Walenta, a cellist with the Wichita Symphony, in her car in her own driveway. When she attempted to escape, the robber shot her three times. She was rendered paraplegic but was able to describe the crime. She died of complications three weeks after the crime. See *id.*, at 20-22, 331 P. 3d, at 576-577.

Finally, they forced their way into the home of Aaron S., Brad H., and Jason B. Holly G. and Heather M. were also in the home at the time. Not content with a home invasion robbery, they engaged in a sadistic and depraved course of forcing the victims to perform sex acts on each other for the Carr brothers' amusement, and then both committed their own sexual assaults. See *id.*, at 22-27, 331 P. 3d, at 577-580. Then they took all five victims out to a soccer field and shot them. See *id.*, at 28-29, 331 P. 3d, at 580-581. Holly G. was wounded but survived, the bullet miraculously deflected by a plastic hair clip. See *id.*, at 30, 331 P. 3d, at 581.

The other four died. "All of the gunshot wounds to the four Birchwood murder victims were consistent with their bodies being in a kneeling position with their heads down when the bullets entered their skulls." *Id.*, at 38, 331 P. 3d, at 586. DNA evidence establishes the identity of the perpetrators. See *id.*, at 39, 331 P. 3d, at 586.

In both cases, the Kansas Supreme Court affirmed the convictions in part and reversed in part and vacated the death sentences. See *id.*, at 17, 254-258, 331 P. 3d, at 574, 706-708; *State* v. *Carr* (*Jonathan*), 300 Kan. 340, 355, 367-371, 329 P. 3d 1195, 1205, 1212-1214 (2014). The affirmed convictions included one count of capital murder of Heather M., Aaron S., Brad H., and Jason B.

The reversal of the sentences was based in part on the holding of *State* v. *Gleason*, 299 Kan. 1127, 329 P. 3d 1102 (2014), that the judge must specifically instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt. Justice Biles, dissenting on this point, noted that "the majority's conclusion defies the United States Supreme Court's established Eighth Amendment jurisprudence and lacks any persuasive analysis articulating why the circumstances in this case justify a departure from that precedent." *Reginald Carr*, 300 Kan., at 327, 331 P. 3d, at 746. This Court granted certiorari in both cases on that issue and a severance issue on March 30, 2015, and consolidated the cases. On the same date, this Court granted certiorari in the *Gleason* case.

> "On February 12, 2004, Gleason, Damien Thompson, Ricky Galindo, Brittany Fulton, and Mikiala "Miki" Martinez robbed Paul Elliott at knifepoint at his home in Great Bend. Sometime thereafter, Gleason and Thompson learned police had interviewed Fulton and Martinez about the robbery. Nine days after the robbery, Gleason and

> Thompson drove from Lyons to Great Bend where Gleason shot and killed Martinez' boyfriend, Darren Wornkey, wounding Martinez in the process. Thompson and Gleason then kidnapped Martinez and took her to a rural location where Thompson strangled, shot, and killed her. Gleason and Thompson left Martinez' body near the road and returned to Lyons. Later that evening, Gleason and Thompson returned to the scene of Martinez' murder, placed Martinez' body near a tree further from the road, and covered her body with small branches." *State* v. *Gleason*, 299 Kan. 1127, 1134, 329 P. 3d 1102, 1113-1114 (2014).

Gleason committed these crimes less than a month after his release on parole for a prior attempted homicide. See *id.*, at 1146, 329 P. 3d, at 1120.

The Kansas Supreme Court affirmed the convictions except for vacating a second murder count for one victim as "multiplicitous." See *id.*, at 1184-1185, 329 P 3d, at 1141. However, the court held that because juries are instructed that aggravating circumstances must be proved beyond a reasonable doubt, the Eighth Amendment to the Constitution of the United States requires that the jury be expressly informed that mitigating circumstances need not be proved to that standard. See *id.*, at 1195-1197, 329 P 3d, at 1146-1148.

SUMMARY OF ARGUMENT

Use of the Eighth Amendment to regulate details of capital sentencing procedure is an unwise practice that this Court largely discontinued many years ago. The primary purpose of procedural reform after *Furman* v. *Georgia* was to reduce arbitrariness, but "tinkering" does just the opposite. When novel constitutional

requirements are fabricated to strike down standard practices, broad swaths of judgments are overturned with little or no regard to whether those sentences were deserved. This is the height of arbitrariness.

Boyde v. *California* appropriately adopted a "reasonable likelihood" test for arguably ambiguous jury instructions to replace the looser test used in *Mills* v. *Maryland*. In deciding what is a reasonably likely interpretation, jurors should be given credit for a basic sense of justice. Given one interpretation that allows them to reach the result they believe to be just and another that forces them to sign their names to a verdict they believe to be wrong and unjust, they should be presumed to adopt the interpretation that leads to a just result. *Mills* was wrongly decided on its facts and should be expressly overruled.

ARGUMENT

I. "Tinkering" of the kind seen in this case is a cause of arbitrariness in the death penalty, not a cure for it.

The decisions of the Kansas Supreme Court in these cases read like a throwback to a bygone era, a time when this Court's "annually improvised Eighth Amendment, 'death is different' jurisprudence," *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), made compliance with shifting dictates nearly impossible. Creative invalidation of established practices, finding constitutional violations where none had been seen for years, is not a cure for the arbitrariness that is supposedly the basis for the entire structure of procedural restrictions on capital punishment. See *Furman* v. *Georgia*, 408 U. S. 238,

309-310 (1972) (Stewart, J., concurring). It is a cause of arbitrariness.

Justice is served when the defendant gets what he deserves. In sentencing in a capital case, that means that those who deserve the death penalty should receive that sentence, and it should be carried out, and those who do not should receive a lesser sentence. The essence of *Furman* is to make that determination of just deserts a more rational and evenhanded process than it was under the unlimited, unguided discretion system that was upheld the year before in *McGautha* v. *California*, 402 U.S. 183, 207 (1971). Yet far too often the rules crafted in the 1980s and the early 1990s have operated to do just the opposite.

A new constitutional precedent on sentencing procedure striking down an established practice causes a huge disruption. All of the cases coming within a certain time window[2] are vacated unless they qualify for harmless error, and the stringent harmless error test in constitutional cases means that few will.[3]

Maryland, for example, was particularly hard hit with new Eighth Amendment rules of dubious legitimacy. The state's pioneering victim impact evidence law was struck down in the wrongly decided case of *Booth* v. *Maryland*, 482 U. S. 496 (1987), overruled in *Payne* v. *Tennessee*, 501 U. S. 808, 828-830

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2. The window may be defined by the date the practice was established, the date of the decision striking it down, and the retroactivity of that decision.

3. *Chapman* v. *California*, 386 U. S. 18, 24 (1967), should be reconsidered at some point in light of the fact that rules deemed constitutional are often not essential to a fair trial. This is particularly true with Eighth Amendment "death is different" sentencing procedure rules.

(1991). The state's standard method of instructing juries was struck down by a narrow majority in *Mills* v. *Maryland*, 486 U. S. 367 (1988), based on a far-fetched theory of possible misinterpretation by jurors. *Mills* used a standard we now know was incorrect. See *Boyde* v. *California*, 494 U. S. 370, 380 (1990). *Mills* was, *amici* submit, wrongly decided on its facts, see *infra* at 14, n. 5, but whether right or wrong *Mills* wiped out sentences in a wide swath of cases with little or no regard for how richly deserved those sentences were.

The arbitrariness of this disruption can be clearly seen in the case of Anthony Grandison. He was a criminal so dangerous that he arranged the murder of witnesses to an earlier crime while in federal custody awaiting trial. Yet his thoroughly deserved sentence was overturned due to *Mills*. See *Grandison* v. *State*, 341 Md. 175, 194, 670 A. 2d 398, 407 (1996). Resentencing and further review took so long that he was still on death row when the Maryland Legislature threw up its hands and gave up on ever having an effective death penalty in the state.[4] A killer who should have been executed decades ago escaped full justice arbitrarily because of the *Mills* case's dubious new rule. It was the reversal, not the imposition, of Grandison's sentence that was "the height of arbitrariness." Cf. *Mills*, 486 U. S., at 374.

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4. The fact that repeal was based on frustration rather than rejection of the death penalty as such is conclusively demonstrated by the fact that the repeal was not retroactive. Grandison's sentence and those of the other remaining death row inmates were commuted by the governor. See Wagner, Gov. O'Malley Commutes Sentences of Death Row Inmates, Washington Post, Dec. 31, 2014, http://www.washingtonpost.com/local/md-politics/gov-omalley-commutes-sentences-of-marylands-remaining-death-row-inmates/2014/12/31/044b553a-90ff-11e4-a412-4b735edc7175_story.html (all Internet materials as visited June 8, 2015).

Similar arbitrary injustice occurred in Florida, after *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987), applied *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion) to overturn sentences rendered in accordance with a law reviewed and upheld in *Proffitt* v. *Florida*, 428 U. S. 242, 248-249, 258 (1976) (lead opinion). *Proffitt* was quite clear that it was reviewing a law with a specified list of mitigating circumstances. See *id.*, at 250 (modifying quote of statute to insert "statutory" before "mitigating"). Even though the lead opinion noted in a footnote that nonstatutory mitigating factors might also be considered, see *id.*, at 250, n. 8, there is no hint that instructing the jury on such consideration was constitutionally required.

Among the undeserving beneficiaries of *Lockett/Hitchcock* was Thomas Knight. In *Knight* v. *Florida*, 528 U. S. 990, 994 (1999), Justice Breyer, dissenting from denial of certiorari, said the long delay in his execution was not his fault because, among other reasons, his initial sentencing was "constitutionally defective." But it was not. His penalty trial was conducted correctly under the law in effect at the time and upheld in *Proffitt* while Knight's case was on direct appeal. See *Knight* v. *State*, 338 So. 2d 201 (Fla. 1976) (decided after *Proffitt*). His well-deserved first sentence was overturned, see *Knight* v. *Dugger*, 863 F. 2d 705, 710 (CA11 1988), because the Eighth Amendment had magically sprouted a new branch without a shred of basis in its text or history, see *Callins* v. *Collins*, 510 U. S. 1141, 1142 (1994) (Scalia, J., concurring in denial of cert.), contradicting the Court's opinions of only a few years earlier requiring restraint on sentencer discretion in order to reduce arbitrariness. See *Lockett* v. *Ohio*, 438 U. S. 586, 623 (1978) (White, J., dissenting in part); *Walton* v. *Arizona*, 497 U. S. 639, 661-667 (1990) (Scalia, J., concurring) (overruled on other grounds in *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002)).

This exceptionally violent multiple murderer, who murdered another person while review of his first case was pending, see *Knight* v. *State*, 721 So. 2d 287, 290 (Fla. 1998), was allowed to live out much of his natural life span and was not executed until 2014, when he should have been executed in the early 1980s. See Associated Press, Fla. Man Executed, Killed Couple, Prison Guard, Jan. 8, 2014, http://www.cbsnews.com/news/fla-man-executed-killed-couple-prison-guard/.

In 1994, dissenting from denial of certiorari in *Callins* v. *Collins*, 510 U. S., at 1145, Justice Blackmun notoriously declared, "I no longer shall tinker with the machinery of death." Those of us who had long fought against the tinkering responded, "Good! By all means stop tinkering!" See also *id.*, at 1142 (Scalia, J., concurring). And the Court did largely stop making up new "death is different" rules of sentencing procedure from that point.

From the mid-1990s onward, this Court made only one sweeping change in capital sentencing procedure. That was *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002), which was an application of a rule developed in a noncapital case under the Sixth Amendment rather than an Eighth Amendment "death is different" rule. The new Eighth Amendment rules have been largely substantive, giving certain small categories of capital defendants "trump cards" that exempt them from capital punishment regardless of how severe the aggravating circumstances of the individual case. See *Roper* v. *Simmons*, 543 U. S. 551, 578 (2005) (under 18); *Kennedy* v. *Louisiana*, 554 U. S. 407, 412-413 (2008) (nonfatal rape of child); *Atkins* v. *Virginia*, 536 U. S. 304, 321 (2002) (intellectual disability, then called mental retardation). These substantive rules cause far less disruption and therefore less arbitrariness than the new procedural rules because, by definition, they only

apply to discrete subsets of defendants who are rarely sentenced to death anyway. In California, for example, there were over 600 prisoners on death row at the time *Atkins* was decided, U. S. Bureau of Justice Statistics, Capital Punishment 2002, Table 4 (2003), but the California Attorney General informs *amici* that there have been only eleven successful *Atkins* postconviction review petitions.

The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), and the "deference" standard of the Antiterrorism and Effective Death Penalty Act of 1996 eventually dampened the tinkering by the lower federal courts, although not without considerable resistance. See, *e.g.*, *Beard* v. *Banks*, 542 U. S. 406, 408-409 (2004) (dubious extension of *Mills* reversed on *Teague* grounds). That still leaves state courts as possible sources of arbitrariness-inducing tinkering, however. If those courts fabricate novel reasons for overturning capital judgments based on state law, the remedies must be found within the state. If the state court invokes the United States Constitution for its tinkering, however, review by this Court is the only remedy.

II. Where an instruction has more than one possible interpretation, the jury should be presumed to apply it in accordance with common sense and a just result.

In cases involving capital penalty phase jury instructions with more than one possible interpretation, there seem to be two sets of opinions. One set gives the jury credit for common sense and for working together to reach a just and sensible result. *Boyde* v. *California*, 494 U. S. 370, 380-381 (1990), typifies this approach.

> "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in

> the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting."

Other cases along similar lines include *Sochor* v. *Florida*, 504 U. S. 527, 538 (1992), *Brown* v. *Payton*, 544 U. S. 133, 147 (2005), and *Ayers* v. *Belmontes*, 549 U. S. 7, 21-22 (2006). The other set of opinions seems to be looking for any excuse to overturn a capital sentence. These include *Mills* v. *Maryland*, 486 U. S. 367 (1988), the opinions of the Kansas Supreme Court in the present cases, and the Ninth Circuit opinions reversed in *Payton* and *Belmontes*.

Mills accepted and *Sochor* rejected an argument based on *Stromberg* v. *California*, 283 U. S. 359, 367-368 (1931). See *Mills*, 486 U. S., at 376-377; *Sochor*, 504 U. S., at 538. The *Stromberg* theory is that if a jury is presented with two possibilities, one valid and the other invalid, the reviewing court must reverse if it cannot tell which of the two the jury chose. *Griffin* v. *United States*, 502 U. S. 46, 59 (1991), recognized an important distinction. In First Amendment cases such as *Stromberg*, one of the alternatives is "invalid" in a way that jurors cannot be expected to recognize, as being in violation of a constitutional right. In *Griffin*, on the other hand, one of the grounds was "invalid" in that it was unsupported by the evidence as to one of the defendants.

> "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When,

> therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence [citation]." *Ibid.*

The choice faced by the jurors in the present cases (if indeed they ever considered for a minute the far-fetched interpretation) is analogous, though not precisely the same. Once a capital case has passed the guilt and "eligibility" decisions, see *Tuilaepa* v. *California*, 512 U. S. 967, 971-972 (1994), the "bottom line" decision in the final "selection" step is a subjective decision as to the just result. While it may be phrased in facially objective terms such as whether aggravating circumstances outweigh mitigating, that weighing process turns on subjectively assigned weights so that it necessarily comes down to each juror's "gut level" assessment of the justice of the case.

If an instruction has two possible interpretations, will a jury engaged in the kind of deliberative process described by *Boyde*, *supra*, adopt the interpretation that forces jurors to sign their names to a bottom-line result they believe to be unjust, or will they adopt the one that allows them to render the verdict they believe to be right? In *Mills*, the Court accepted the petitioner's wild speculation that all 12 jurors might sign their names to a death verdict " 'even though eleven jurors think the death penalty wholly inappropriate.' " 486 U. S., at 374. The notion that jurors would do so when another interpretation is available to them borders on absurd. On a 12-member jury, even if a majority interpreted the instruction that way, surely some would not and would seek clarification from the judge.

The "reasonable likelihood" standard of *Boyde* should be bolstered with a presumption that jurors will lean toward an interpretation that allows them to reach the verdict they believe to be just whenever such an interpretation is available.[5] The idea that jurors would ignore mitigating circumstances that they believed to be proved by a preponderance of the evidence *and* that they believed warranted a sentence less than death and would then sign their names to a verdict they believed to be unjust would require a nearly ironclad, inescapable instruction to support it. In this case, there is nothing more than the absence of an instruction refuting a speculative inference that they might have thought the burdens of proof were symmetrical. See *State* v. *Gleason*, 299 Kan., at 1211, 329 P. 3d, at 1155 ("rank speculation"). Nothing in the Constitution of the United States requires reversing a verdict on such flimsy reasoning.

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5. *Mills* was wrongly decided on its facts. *Boyde* has already disapproved the standard used in *Mills*. Chief Justice Rehnquist's dissent in *Mills* explains that applying a reasonableness standard produces the opposite result. See 486 U. S., at 395. *Mills* should be expressly overruled before it causes any more damage. See *State* v. *Gleason*, 299 Kan., at 1195-1197, 329 P. 3d, at 1146-1148 (relying on *Mills*).

CONCLUSION

The decisions of the Kansas Supreme Court in all three cases should be reversed.

June, 2015

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amici Curiae
Criminal Justice Legal Foundation
National District Attorneys Association
California District Attorneys Association

No. 14-449 and 14-450

In The
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Respondent.

On Writs Of Certiorari
To The Supreme Court of Kansas

Amicus Brief Of
The Promise of Justice Initiative
In Support of Respondents

ROBERT J. SMITH
1600 RIDGE ROAD
CHAPEL HILL, NC 27514

AMY WEBER
P.O. BOX 17265
CHAPEL HILL, NC 27516

G. BEN COHEN
Counsel of Record
MICHAEL ADMIRAND
636 BARONNE STREET
NEW ORLEANS, LA. 70113
504-529-5955
bcohen@thejusticecenter.org

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Lois Heaney, *Severance Motions: Successful Application of Social Science Evidence*, 15 CACJ FORUM 20 (1988) 20

INTERESTS OF *AMICUS CURIAE*[1]

The Promise of Justice Initiative (PJI) is a non-profit law office dedicated to upholding constitutional integrity. PJI addresses issues concerning, among others, the fairness of the administration of capital punishment.

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[1] Pursuant to this Court's Rule 37, *Amicus* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties gave universal consent to the filing of amicus briefs.

INTRODUCTION

The Kansas Supreme Court held that respondents' death sentences violated the Eighth Amendment because the trial court failed to sever the penalty phase of the underlying capital trial. The state Supreme Court expressed concern that the denial of severance, under the circumstances of that particular case, created an unnecessary risk that the penalty phase determination would be unreliable. The most unusual aspect of the proceedings may have been that the trial court had not made the same determination. This *Amicus Brief* notes the broad and consistent trajectory away from joined capital proceedings as a component of the evolving standards of decency.

SUMMARY OF ARGUMENT

In the majority of states, no death sentence has been imposed as a result of a joint trial since before *Furman*.[2] *See* Appendix I. Though this national trend towards individualized sentencing dates back over a century, it has increased as society (and this Court) has embraced the need for individualized determinations of moral culpability. Even in the federal system, where the majority of joint trials occur, courts have increasingly

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[2] *Furman v. Georgia*, 408 U.S. 238 (1972).

employed separate—or at the least, sequential—capital trials. *See* Appendix II.[3]

Thus, in light of the infrequent resort to this procedural rule, and the concomitant concern regarding the unreliable imposition of the death penalty, this Court's role is to "examine [this] capital sentencing procedure against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *see also Hall v. Florida*, 134 S. Ct. 1986, 1990–98 (2014) (invalidating Florida's "rigid rule" for "determining intellectual disability both because, it "creates an unacceptable risk that persons with intellectual disability will be executed" and "strong evidence of consensus" demonstrated that "our society does not regard this strict cutoff as proper or humane"). Ultimately, this case does not require the Court to determine that severance is required in every capital case, but merely whether the Kansas Supreme Court

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[3] The information included in Appendix II is drawn from the data secured from the Federal Death Penalty Project Resource Counsel. The Federal Death Penalty Resource Counsel Project was established in 1992 by the Administrative Office of the United States Courts, Defender Services Division (now the Office of Defender Services). *See* www.capdefnet.org/fdprc/. The Project monitors all federal death penalty cases, maintaining data on every potentially capital federal prosecution. Project statistics, including information on all federal capital cases tried jointly or severed is available at https://capdefnet.org/FDPRC/pubmenu.aspx?menu_id=98&folder_id=2494.

properly exercised restraint in deciding that the need for a reliable determination of death, based upon an individualized determinations of moral culpability, warranted severance of the penalty phases in this case.

ARGUMENT

I. The Decades-Long Progression Towards Reliable And Meaningfully Individualized Determinations of Moral Culpability Supports The Kansas Supreme Court's Decision to Order Severance in This Capital Case

A joint penalty phase proceeding in a capital trial creates a risk of wrongful execution by undermining the process for obtaining reliable, individualized determinations of moral culpability. Presumably for these reasons, despite whatever efficiency may be secured in joint proceedings, contemporary norms disfavor the practice.

A. The Evolving Standards of Decency Support the Decision to Require Individualized Determinations of Moral Culpability in this Case

The United States asserts "joint trials have been recognized as a fair means of adjudicating criminal cases, including capital cases, since the Founding Era." Br. of The United States 14; *id.* at 17 (noting that the Court has affirmed joint trials in an "unbroken line of cases dating back to the Founding Era"). Though historically accurate, the

argument overlooks the Eighth Amendment's commitment to the evolving standards of decency.

In the Founding Era, capital and non-capital trials were functionally indistinguishable. For a broad range of offenses, a guilty verdict carried an automatic death sentence. Thus, at the Founding, and for decades thereafter, a finding that a defendant committed the crime sufficed to reflect sufficient culpability to warrant a death sentence.

Certainly by 1932, courts had recognized the benefits of separate trials in capital cases. Dissenting from the decision in *Powell v. Alabama*, Justice Butler provided the parsimonious observation that it was sufficient that the nine defendants had been tried in four separate trials. 287 U.S. 45, 74 (1932) ("Nine defendants including Patterson were accused in one indictment, and he was also separately indicted. Instead of trying them *en masse*, the State gave four trials and so lessened the danger of mistake and injustice that inevitably attends an attempt in a single trial to ascertain the guilt or innocence of many accused."). But this accolade for four joint trials in the *Powell v. Alabama* dissent essentially establishes the point: the evolving standards of decency would no longer tolerate the process given the *Scottsboro Boys*.[4]

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[4] See Dan T. Carter, *Scottsboro: A Tragedy of the American South* 22 (Rev. Ed. 2007) ("Circuit Solicitor Bailey had expected the defense lawyers to request a severance for all nine of the defendants but Roddy told the court he was willing

By the mid-1900s, mandatory death sentences had gone out of fashion. *See Williams v. New York*, 337 U.S. 241, 247 (1949) ("This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions."); *id.* ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."). Indeed, when a handful of states reenacted mandatory death sentencing schemes in the wake of *Furman v. Georgia*, the Court invalidated those statutes as "unduly harsh," "unworkably rigid," and contrary to societal standards of decency. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

"The fundamental respect for humanity underlying the Eighth Amendment," *Woodson* found, "requires consideration of the character and record of the individual offender." *Id.* at 304. Such consideration is necessary "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

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to have all nine tried at the same time. Bailey, however, for reasons which later became clear, moved to try Clarence Norris, Charley Weems, and Roy Wright.").

Thus, over time, evolving standards of decency required the death penalty "be limited to those offenders who commit a narrow category of the most serious crimes *and* whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (emphasis supplied). Today, in every jurisdiction that retains the death penalty, capital trials have two discrete phases. The first phase, where guilt or innocence is decided, reflects many of the same interests as non-capital trials do (and that capital trials did in the Founding Era). The second phase, however, is different. The goal in that part of a capital trial is to assign moral, not factual, guilt. *See Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (penalty phase judgment must reflect "a reasoned *moral* response to the defendant's background, character, and crime.") (emphasis in original). Thus, the second phase of the capital trial, the penalty phase, ensures that the jury does not impose a death sentence "in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Despite the discrete goals of the two phases of a capital trial, the United States asserts that joint sentencing proceedings promote fairness by facilitating more accurate assessments of relative culpability, minimizing the risk of inconsistent verdicts, and ensuring that capital punishment is not applied in an arbitrary or capricious fashion. Br. of The United States 15. However, the United States' claim that joint trials prevent "arbitrary or capricious" capital sentencing is, at best,

unfounded. *Furman*'s prohibition on arbitrary capital sentencing has never been interpreted to require that co-defendants receive the same sentences. In fact, the opposite is true.[5]

Indeed, courts have made clear that there is no independent interest in "consistency" of sentencing between co-defendants; at the least it is an invalid justification for undermining a defendant's right to an individualized sentencing determination. Complaints concerning disparate sentencing of co-defendants are not only insignificant; many courts have found it irrelevant to a proper sentencing determination.[6] To the

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[5] *See e.g.*, *Getsy v. Mitchell*, 495 F.3d 295, 306 (6th Cir. 2007) (death penalty not unconstitutionally arbitrary or disproportionate because co-defendant received a life sentence); *Beardslee v. Woodford*, 358 F.3d 560, 579–81 (9th Cir. 2004) (rejecting the argument that "different sentences for equally culpable co-defendants violate the prohibition against arbitrary imposition of the death penalty in Furman"); *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996) (defendant's death sentence not arbitrary or disproportionate because codefendant's death sentence had been vacated on appeal); *Hatch v. Oklahoma*, 58 F.3d 1447, 1466 (10th Cir. 1995) (rejecting the defendant's claim that the Constitution required "a proportionality review of his sentence relative only to his co-defendant"), overruled in part on other grounds by *Daniels v. United States*, 254 F.3d 1180, 1188 n. 1 (10th Cir. 2001).

[6] *See, e.g.*, *Postelle v. State*, 267 P.3d 114, 140–41 (Okla. 2011) (life sentence imposed on co-defendant was not relevant or admissible in penalty phase of capital trial); *People v. Moore*, 253 P.3d 1153, 1181 (Cal. 2011) (evidence concerning co-participants' sentences is properly excluded from penalty

extent a defendant has an interest in presenting evidence that an equally or more culpable co-defendant will not be sentenced to death, that mitigating evidence can be presented at a sequential or severed penalty phase.[7]

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phase of capital trial because such evidence is irrelevant); *Meyer v. Branker*, 506 F.3d 358, 375–76 (4th Cir. 2007) (because a co-perpetrator's sentence is "neither an aspect of the defendant's character or record nor a circumstance of the offense," court may exclude evidence as irrelevant); *Saldano v. State*, 232 S.W.3d 77, 100 (Tex. Crim. App. 2007) (evidence of co-defendant's conviction and punishment is not relevant and admissible because it does not relate to the defendant's own circumstances); *Commonwealth v. Williams*, 896 A.2d 523, 524 (Pa. 2006) (rejecting argument that criminal disposition of defendant's cohorts has any relevance in mitigation to defendant's own punishment); *Beardslee*, 358 F.3d at 579 (co-defendant's sentences were irrelevant to defendant's proper punishment); *State v. Jaynes*, 549 S.E.2d 179 (N.C. 2001) (fact that codefendant was allowed to plead to second degree murder and receive sentence of life in prison was irrelevant in penalty phase of capital trial); *State v. Charping*, 508 S.E.2d 851, 855–56 (S.C. 1998) (co-defendant's sentence is not relevant mitigating evidence and presentation encourages proportionality review by the jury, which is a task reserved for the courts); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986) (*Lockett* does not require trial court to allow capital defendant to introduce evidence not relevant to his character, prior record or circumstances of his offense; evidence of co-defendant's life sentence is relevant only to task of comparing proportionality of defendant's sentence to sentences of others similarly situated, a function assigned by statute to Louisiana Supreme Court).

[7] See *United States v. Sablan*, No. 00-CR-00531 (D. Colo. 2006) (penalty phase life verdict for William Sablan issued on

Moreover, because "death is qualitatively different from a sentence of imprisonment, however long, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson*, 428 U.S. at 305; *Lockett*, 438 U.S. at 604 (finding that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

The goal of consistent verdicts based on the nature of the crime is *at best* of secondary significance to the goal of ensuring that each defendant, regardless of the heinousness of the crime committed, possesses sufficient moral and personal culpability to warrant the death penalty.[8]

April 6, 2007. Penalty phase verdict for Rudy Sablan issued May 23, 2008, in which seven jurors found as a mitigating factor that "William Sablan, equally culpable in the crime, will not be punished to by death.") The penalty phase verdict forms for Rudy and William Sablan are available at the Federal Death Penalty Resource Counsel web page, located at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=803&folder_id=5633.

[8] Courts have recognized that jury-comparison of the sentences of co-defendants is improper because it shifts the sentencing determination away from the defendant's culpability and character, thereby undermining the requirement of individualized sentencing. *See State v. Gamble*, 63 So. 3d 707, 728 (Ala. Crim. App. 2010) (consideration of co-defendant's sentence violated requirement that individualized sentencing is focused on the defendant); *State v. Schneider*, 736 S.W.2d 392, 397 (Mo. 1987) (consideration of co-defendant's sentence, an "extraneous

Since two people with wildly different abilities "to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," *Atkins v. Virginia*, 536 U.S. 304, 320 (2002), sometimes work together to commit the same heinous crime, a consistent verdict based on the offense does not translate into a consistent verdict based on the moral culpability of the defendants. In this sense, consistent verdicts based on crime characteristics *increase rather than reduce* the arbitrary and capricious application of the death penalty.

In *Kennedy v. Louisiana*, this Court noted the "32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition." 554 U.S. at 440. Kansas and her *amici* focus on "one approach" that "has been to insist upon general rules that ensure consistency in determining who receives a death sentence." *Id.* at 436. However, in doing so, they ignore the other: that "the Court has insisted, to ensure restraint and moderation in use of capital punishment, on judging the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Id.*

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fact[] unconnected to the individual defendant and his offense would not be consistent with the jury's duty under the Missouri murder statute").

Because the need for consistency does not apply with equal force to the penalty phase of a capital trial, the question becomes one of the degree to which joint penalty phase proceedings risk jeopardizing the ability of "a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006). Unfortunately, as the penalty phase of Jonathan and Reginald Carr's capital trial illustrates, joinder creates an intolerable risk that jurors will be unable to reliably gauge whether a defendant possesses sufficient moral culpability for death to be an appropriate punishment.

The Court has recognized that certain mitigating evidence "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321. As the Kansas Supreme Court recognized, the prejudice here is greater still: evidence presented by each brother was aggravating to the other *without* providing any corresponding benefit. The State's purported interest in consistency is insufficient to justify such prejudice. And the Kansas Supreme Court was correct to proceed with caution when facing these risks.

B. The Kansas Supreme Court Decision Directing Severance in This Capital Case is Consistent with Trend Towards Individualized Determinations of Culpability Guaranteed by the Eighth Amendment.

There is a clear trend away from joint trials. Twenty jurisdictions (nineteen states and the District of Columbia) have abolished the death penalty. See Appendix I.[9] In those jurisdictions, neither Jonathan nor Reginald Carr could face a penalty phase trial—joint or otherwise. *See Hall*, 134 S. Ct. at 1997 (counting abolitionist states among those who rejected Florida's strict IQ cutoff because a person in Hall's position could not be executed even without a finding of intellectual disability).

In addition to those twenty jurisdictions, three states provide for severance in capital cases. Mississippi flatly prohibits joint trials in capital cases. *Smith v. State*, 729 So. 2d 1191 (Miss. 1998) ("a defendant in a capital case has an absolute right to a separate trial from that of a co-defendant); Miss. Code Ann. § 99-15-47 ("Any of several persons jointly indicted for a felony may be tried separately on making application therefor, in

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[9] On May 27, 2015, the State of Nebraska abolished the death penalty. Prior to its abolition, Nebraska had countenanced a joint capital proceeding on a single occasion. *State v. Ryan*, 444 N.W.2d 610, 628 (Neb. 1989) ("Defendant was not prejudiced by the joinder of his trial with the trial of Dennis Ryan.").

capital cases."). Ohio employs a strong presumption against joint trials. Ohio Rev. Code Ann. § 2945.20 ("When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately."). Georgia law, adopted after *Furman v. Georgia*, provides "if the state is seeking the death penalty, Code Ann. § 27-2101 gives any defendant so electing the absolute right to be tried separately." *Reaves v. State*, 250 S.E.2d 376, 382 (Ga. 1978); *See* Ga. Code Ann. § 17-8-4 ("When two or more defendants are jointly indicted for a capital offense, any defendant so electing shall be separately tried unless the state shall waive the death penalty.").

In two other states—New Hampshire and Wyoming—amicus could not find evidence of any joint trial in a capital case in the modern era. *See State v. Best*, 12 P.2d 1110 (Wyo. 1932); *State v. Doolittle*, 58 N.H. 92 (1877). Moreover, as noted in Appendix I (C), a significant number of jurisdictions have long since abandoned joint trials in capital cases. In Louisiana, there is no record of a joint capital trial proceeding to an actual verdict. See *State v. Laymon*, 97-1520 (La. App. 4 Cir 3/15/00); 756 So.2d 1160 (involving the only case identified by amicus in which a severance in a capital case was denied; ending in a mistrial and a retrial on second degree murder). Montana's only joined capital trials occurred prior to this Court's ruling in *Ring v. Arizona*, where the sentencing phase occurred before a judge only. *State v. Gollehon*, 864 P.2d 249 (Mont. 1993); *State v. Turner*, 864 P.2d 235 (Mont. 1993). Virginia has no appellate record

of a joined capital proceeding resulting in a death verdict. Washington and Idaho have not had joined capital proceedings in over thirty years.[10]

Here, amicus does not suggest that this case requires a categorical rule imposing severance in capital cases. However, it is apparent that, in the majority of jurisdictions, individualized determinations of culpability are the norm. The Kansas Supreme Court decision was in step with the judgment of this majority of jurisdictions.

As the United States details in its Brief, the federal death penalty presents something of a counter-point to the national norm disfavoring joint penalty phase trials.[11] Br. of The United States at 20 (identifying "19 capital trials since 2000" with joint penalty phase proceedings and "16 capital trials during that time in which district courts exercised their discretion to grant a severance of capital defendants at either the guilt or penalty phase"). *But see United States v. Ayala Lopez*, 319 F Supp. 2d 236, 240 (D. P.R. 2004) ("in the majority of federal death penalty cases some type of severance has been granted."). The Brief of the

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[10] *State v. Grisby*, 647 P.2d 6, 15 (Wash. 1982) ("Frazier argues the failure of the trial court to sever the penalty phase of the trial denied his constitutional right to confront his accusers."); *State v. Caudill*, 706 P.2d 456, 462 (Idaho 1985).

[11] The widespread use of joined trials in federal cases arises from the presumption for joint trials in conspiracy cases. *See, e.g., United States v. Reavis*, 48 F.3d 763, 767 (4th Cir. 1995).

United States omits a number of cases involving joined cases as well as those where severance has appeared to be granted. See Appendix II (B) (numbers 17-29); Appendix II (A) (numbers 19-25). Regardless, it is hard to know what to make of those numbers. First, as noted above, the numbers provided by the Government appear to under-represent a number of cases where federal district courts have severed capital proceedings or required sequential penalty phase proceedings to prevent the prejudice associated with joint penalty phase trials. Second, the Government does not note whether the defendants in each of those nineteen (19) (or, as corrected in Appendix II (A), twenty-five (25)) joint trials requested severance. *See, e.g.*, *United States v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002) ("Vialva urges that the trial court should have severed his case from Bernard's at the penalty phase of trial. Vialva concedes that this issue must be reviewed for plain error, since he did not object to Bernard's evidence and failed to renew an unsuccessful pretrial motion for severance."); *id.* ("Vialva, but not Bernard, moved to sever the trials at the outset of the proceedings").[12] Third, the

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[12] Similarly, in *United States v. Coonce*, No. 10-CR-03029 (W.D. Mo. 2014), the district court denied the severance requested by defendant-Coonce because it was objected to by defendant-Hall. Both were sentenced to death. Whatever one infers from this sequence of events, the failure to sever (or hold sequential proceedings, as other federal courts have done, see *United States v. Lewis*, No. 07-CR-00550 (E.D. Pa. 2013) (5/14/2013); *United States v. Aquart*, 2010 U.S. Dist. LEXIS 82877 at *25–26, to ensure that one defendant receives

data provided by the United States is at best misleading. Indeed, in at least one of the nineteen cases that the United States cites as an example of joined capital proceedings – *United States v. Lecco*, No. 05-CR-00107 (S.D. W. Va. 2007) – the matter was ultimately severed after a reversal of both defendants' death sentences. *See United States v. Lecco*, 2009 U.S. Dist. LEXIS 79799 (S.D. W. Va. Sept. 3, 2009). During the subsequent severed re-trial proceedings, one defendant received a life sentence and the other pled to a sentence less than life. This hardly provides support for the principle that joint proceedings are regularly conducted, let alone confidence that the two death sentences initially imposed in the joint proceeding provided a reliable determination of culpability. Regardless, when more than half of the federal capital cases identified are severed or tried sequentially, it provides further support for amicus's contention that the decision of the Kansas Supreme Court comported with the national consensus.

C. Joint Penalty Phase Proceedings Can Create An Unacceptable Risk That A Person Will Be Executed Despite Factors That Warrant Leniency

Joint penalty phase proceedings create an unacceptable risk that defendants – entitled to

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the mitigating evidence in his co-defendant's case but the other defendant is not prejudiced by the comparable evidence) hardly gives confidence in the reliability of the joined process.

individualized determinations of culpability – will be punished in concert. As noted in Appendix II (A), the disquieting reality is that defendants tried together receive the same punishment in the vast majority of the cases (whether death or life imprisonment). *See* Appendix II (A) (noting that every single defendant tried together received the same punishment). The Governmental interest in "consistent penalties" is at its nadir where defendants with widely divergent levels of culpability both receive the same sentence. The assurance of Petitioner and her amicus the United States, that juries are readily able to differentiate the moral culpability of jointly tried defendants is undermined by the apparent circumstance that no joint trial identified in Appendix II (A) resulted in distinct or different punishments. What are the odds, we ask, that every joined penalty phase trial involved defendants of distinctly the same culpability, so much so that jury returned the very same sentence? Or does the circumstance of the same verdicts in these joined penalty phases connote an unnecessary risk that defendants tried together will receive the same sentence despite distinct levels of culpability?

Many federal courts facing the issue have decided, similar to the decision of the Kansas Supreme Court, to avoid the risk of an unreliable death sentence. Recognizing that joinder was generally presumed, the district court in *United States v. Lecco* nevertheless observed:

> [T]he gravity of the sentence sought especially implicates the societal interest in convicting only the guilty. The dual-prosecutor quandary is a particular concern in this regard. In any capital proceeding, an accused convicted of the crimes charged is next faced with offering the best possible case in mitigation so as to avoid the ultimate sanction.
>
> In assuring that only those most deserving of a capital sentence actually receive it, society benefits from allowing a defendant to make the best case in mitigation possible to a fact finder who has under consideration that defendant alone. This one-on-one adversarial approach more faithfully implements the apparent intention of the FDPA, and the jurisprudence of the Supreme Court, that a capital defendant receive from the jury an individualized decision concerning the propriety of the ultimate sanction.

Lecco, 2009 U.S. Dist. LEXIS 79799 at *9–10. Similarly, in *United States v. Johnson, Jones Sr. and Smith*, the district court observed:

> Under the Eighth Amendment, a capital defendant is entitled to an individualized hearing to prevent the

> arbitrary and capricious imposition of the irrevocable punishment of the death. The Court finds that a joint penalty phase in this case would necessarily dilute the focus from one individual in the eyes of the jury and prejudicially blur the two defendants' arguments with respect to mitigation. To the extent that both Defendants argue the same theory of mitigation, the reasonably anticipated effect could be to undermine the integrity of the individualized hearing and be less persuasive by virtue of the repetition.

United States v. Johnson, Jones Sr. and Smith, 04-cr-00017 (Doc. 1630) (E.D. La. 06/23/2005) (citing *United States v. Green*, 324 F. Supp. 2d 311, 326 (D. Mass. 2004) ("virtually every argument for mitigation made by one defendant will be in effect an argument against mitigation as to the other defendant if that defendant cannot claim the same attribute.")). In some instances, federal courts have attempted to reduce the prospect of prejudice to a penalty phase determination by ordering sequential penalty phases. *See United States v. Aquart*, 2010 U.S. Dist. LEXIS 82877 at *25–26 (D. Conn. Aug. 13, 2010) (noting "if a joint penalty trial were held, Azibo could be at risk that the jury's conclusion of Azikiwe's lesser culpability, based on his not being the leader of the Aquart Enterprise, could support a jury's conclusion that Azibo is comparatively more deserving of the death penalty."); *id.* ("risk will be

largely mitigated by holding separate penalty trials, with Azibo's to be held first").

These cases do not stand for the proposition that severance is always required in capital cases; only that—as the Kansas Supreme Court appeared to find—the government's interest in joinder in capital cases must sometimes yield to the Eighth Amendment's requirement of individualized determinations. *See also Williams v. Superior Court*, 683 P.2d 699, 707 (Cal. 1984) ("A final consideration in our analysis is that since one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case.").

These opinions reflect a consistency with the considered judgment of the Kansas Supreme Court, as well as the insights of social science research.

Social science research suggests that jurors deciding the penalties for jointly tried capital codefendants are (i) less likely to consider individually a capital defendant's mitigating evidence; (ii) more likely to offer identical sentences based on similar reasoning for each codefendant; and (iii) more likely to arrive at a death sentence.

Several studies suggest the existence of an assimilation effect undermining the interest in individualized determinations of culpability. Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying, and Jennifer Pryce, *Jury*

Decision Making: 45 Years of Empirical Research on Deliberating Groups, 7 PSYCH. PUB. POL. AND L. 622, 672 (2001) ("Three studies suggest the existence of an assimilation effect wherein juries perceive less distinction among defendants in joined trials than in separate trials."). *See also* Lois Heaney, *Severance Motions: Successful Application of Social Science Evidence*, 15 CACJ FORUM 20 (1988) (detailing research conducted by the National Jury Project that found related co-defendants tended to be less candid with counsel, and that "family and friends of the defendants agonized that their testimony although favorable as to one defendant would damage the other, if only by faint praise. As a result defendants were often deprived of witnesses essential at either the guilt or penalty phase and the attorneys were left to argue theories of mitigation with little supporting evidence."); Edward Bronson, *Severance of Co-defendants in Capital Cases: Some Empirical Evidence*, 21 CACJ FORUM 52 (1994) (noting that "difficulties arise if the penalty phase mitigation is similar for each defendant; equally intractable problems may arise if defense counsel choose different approaches to the penalty phase," and identifying study that determined that in a joined trial "jurors would have great difficulty considering separately the guilt evidence and each individual defendants mitigating penalty-phase evidence").

CONCLUSION

For the reasons developed herein, *Amicus* respectfully suggest that this Court uphold the decision of the Kansas Supreme Court.

Respectfully submitted,

ROBERT J. SMITH
1600 RIDGE ROAD
CHAPEL HILL, NC 27514

AMY WEBER
P.O. BOX 17265
CHAPEL HILL, NC 27516

G. BEN COHEN
Counsel of Record
MICHAEL ADMIRAND
636 BARONNE STREET
NEW ORLEANS, LA. 70113
504-529-5955
bcohen@thejusticecenter.org

APPENDIX I

Appendix I (A) – Jurisdictions that do not impose the death penalty (20)

Alaska
District of Columbia
Connecticut
Hawaii
Illinois
Iowa
Maine
Maryland
Massachusetts
Michigan
Minnesota
Nebraska
New Jersey
New Mexico
New York
North Dakota
Rhode Island
Vermont
West Virginia
Wisconsin

Appendix I (B) – Jurisdictions that prohibit joint capital trials (3)

Georgia: Ga. Code Ann. § 17-8-4(a) (allowing automatic severance upon election by any defendant in a capital trial)

Mississippi: Miss. Code Ann. § 99-15-47 (allowing automatic severance upon application by any defendant for any felony)

Ohio: Ohio Rev. Code Ann. § 2945.20 (allowing automatic severance unless good cause can be shown).[1]

Appendix I (C) – Jurisdictions that have no appellate decision reflecting a joint capital sentencing phase with a jury (12)

Arizona
Colorado
Louisiana
Idaho
Missouri
Montana
New Hampshire
Oregon
South Dakota
Utah
Virginia
Wyoming

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[1] Even with this theoretical allowance of joinder, no joint capital penalty phase has occurred before a jury in Ohio.

Appendix I (D) – Jurisdictions that have had a joint capital sentencing phase with a jury and last reported decision

Alabama[2] – latest reported trial in 1995: *Hardy v. State*, 804 So. 2d 247 (Ala. Crim. App. 1999)

Arkansas – latest reported trial in 1994: *Echols v. State*, 936 S.W.2d 509 (Ark. 1996); *Echols v. State*, 902 S.W.2d 781 (Ark. 1995)

California – latest reported trial in 1996: *People v. Valdez*, 281 P.3d 924 (Cal. 2012)

Delaware – latest reported trial in 1998: *Barrow v. State*, 749 A.2d 1230 (Del. 2000) (no severance requested)

Florida[3] – latest reported trial in 2007: *Jackson v. State*, 25 So. 3d 518 (Fla. 2009)

Indiana – latest reported trial in 1990: *Roche v. State*, 690 N.E.2d 1115 (Ind. 1997); *Roche v. State*, 596 N.E.2d 896 (Ind. 1992).

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[2] Alabama sentencing juries return only advisory verdicts. Judges retain final decision on sentencing. Ala. Code § 13A-5-46; Ala. Code § 13A-5-47 ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.").

[3] Florida sentencing juries return only advisory verdicts. Judges retain final decision on sentencing. Fla. Stat. § 921.141 ("Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death. ").

Kentucky – latest reported trial in 2000: *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003)

Nevada – latest reported trial in 2006: *Chartier v. State*, 191 P.3d 1182 (Nev. 2008)

North Carolina – latest reported trial in 2001: *State v. Bell*, 603 S.E.2d 93 (N.C. 2004); State v. Sims, 588 S.E.2d 55 (N.C. Ct. App. 2003)

Oklahoma – latest reported trial in 2004: *Lay v. State*, 179 P.3d 615 (Okla. Crim. App. 2008) (no severance requested)

Pennsylvania – latest reported trial in 2010: *Commonwealth v. Floyd*, 2013 Pa. Super. Unpub. LEXIS 2368 (Pa. Super. Ct. 2013); *Commonwealth v. Warner*, 2013 Pa. Super. Unpub. LEXIS 2353 (Pa. Super. Ct. 2013)

South Carolina – latest reported trial in 1986: *State v. Howard*, 369 S.E.2d 132 (S.C. 1988); *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997)

Tennessee – latest reported trial in 1999: *State v. Graham*, 2001 Tenn. Crim. App. LEXIS 241 (Tenn. Crim. App. Mar. 29, 2001)

Texas – latest reported trial in 1985: *Barrientes v. State*, 752 S.W.2d 524 (Tex. Crim. App. 1987); *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000) (no severance requested)

Washington – latest reported trial in 1978: *State v. Grisby*, 647 P.2d 6 (Wash. 1982); *State v. Grisby*, 2004 Wash. App. LEXIS 1135 (Wash. Ct. App. June 1, 2004)

APPENDIX II

Appendix II (A) – Federal Capital Trials Involving Joint Penalty-Phase Proceeding **(bold = information not provided by the United States of America as Amicus)**

1. *United States v. Coonce*, No. 10-CR-03029 (W.D. Mo. 2014) (Wesley Paul Coonce, Jr. and Charles Michael Hall) **(death, death)**; **(Offered sequential trial; rejected by one defendant)**;

2. *United States v. Salad*, No. 11-CR-00034 (E.D. Va. 2012) (Ahmed Muse Salad, Abukar Osman Beyle, and Shani Shiekh Abrar) **(life, life, life)**;

3. *United States v. Snarr*, No. 09-CR-00015 (E.D. Tex. 2009) (Mark Isaac Snarr and Edgar Baltazar Garcia) **(death, death)**;

4. *United States v. Mills*, No. 02-CR-00938 (C.D. Cal. 2007) (Wayne Bridgewater and Henry Michael Houston) **(life, life)**;

5. *United States v. Dinkins*, No. 06-CR-00309 (D. Md. 2009) (James Dinkins and Melvin Gilbert) **(life, life)**;

6. *United States v. Varela*, No. 06-CR-80171 (S.D. Fla. 2009) (Ricardo Sanchez, Jr. and Daniel Troya) **(death, death)**;

7. *United States v. Lecco*, No. 05-CR-00107 (S.D. W. Va. 2007) (George M. Lecco and Valerie Friend) **(death, death)**; **(Severance granted on retrial) (on retrial, life, and less than life)**;

8. *United States v. Mikhel*, No. 02-CR-00220 (C.D. Cal. 2007) (Iouri Mikhel and Jurijus Kadamovas) **(death, death)**;

9. *United States v. Mills*, No. 02-CR-00938 (C.D. Cal. 2006) (Barry Byron Mills and T.D. Bingham) **(life, life)**;

10. *United States v. Williams*, No. 01-CR-00512 (E.D. Pa. 2006) (Vincent Williams, Jamain Williams, and Andre Cooper) **(life, life, life)**;

11. *United States v. James*, No. 02-CR-00778 (E.D.N.Y. 2005) (Richard James and Ronald Mallay) **(life, life)**;

12. *United States v. Rivera*, No. 04-CR-00283 (E.D. Va. 2005) (Oscar Antonio Grande and Ismael Juarez Cisneros) **(life, life)**;

13. *United States v. Williams*, No. 00-CR-01008 (S.D.N.Y. 2005) (Elijah Bobby Williams and Reverend Michael Williams) **(life, life)**;

14. *United States v. Quinones*, No. 00-CR-00761 (S.D.N.Y. 2004) (Alan Quinones and Diego B. Rodriguez) **(life, life)**;

15. *United States v. Breeden*, No. 03-CR-00013 (W.D. Va. 2004) (Shawn Arnette Breeden and Michael Anthony Carpenter) **(life, life)**;

16. *United States v. Foster*, No. 02-CR-00410 (D. Md. 2004) (Keon Moses and Michael Lafayette Taylor) **(life, life)**;

17. *United States v. Matthews*, No. 00-CR-00269 (N.D.N.Y. 2003) (Lavin Matthews and Tebiah Shelah Tucker **and Christopher McMillian**)

(life, life, life); (McMillian excluded from death due to intellectual disability)

18. *United States v. Gray*, No. 00-CR-00157 (D.D.C. 2003) (Kevin Gray and Rodney Moore) **(life, life)**;

19. *United States v. Vialva*, No. 99-CR-00070 (W.D. Tex. 2000) (Christopher Andre Vialva and Brandon Bernard) **(death, death)**;

20. *United States v. Tipton*, No. 3-92-CR-68 (E.D. Va. 1992); aff'd, 90 F.3d 861 (4th Cir. 1996) (Richard Tipton, James Roane, and Corey Johnson) (death, death, death);

21. *United States v. Oscar*, No. 93-CR-131 (E.D. Va. 1993); 67 F.3d 297 (4th Cir. 1995) (Jean Claude Oscar, Frantz Oscar, and Arnold Mark Henry) (life, life, life);

22. *United States v. Walker*, No. 94-CR-328 (N.D.N.Y., 1994) (Tyrone Walker and Walter Diaz) (life, life);

23. *United States v. Moore*, No. CR 94-00194-01-12-CR-W-9 (W.D. Mo. 1994) (Dennis Moore, Sr. and Kevin Wyrick) (life, life); (sequential jury determinations, death withdrawn as to Wyrick after Moore's life sentence);

24. *United States v. Jordan*, No. 04-CR-58-ALL (E.D. Va. 2004) (Peter Jordan and Lorenzo Gordon) (life, life);

25. *United States v. Bodkins*, No. 4:04-CR-70083-JLK-ALL (W.D. Va. 2004) (Lanny Benjamin Bodkins and Antoine Plunkett) (life, life).

Appendix II (B) – Federal Capital Trials Involving Severed Guilt- Or Penalty-Phase Proceedings **(bold = information not provided by the United States of America as Amicus)**

1. *United States v. Lewis*, No. 07-CR-00550 (E.D. Pa. 2013) (Steven Northington and Kaboni Savage) **(life, death) (sequential sentences by same jury, not severed)**;

2. *United States v. Eye*, No. 05-CR-00344 (W.D. Mo. 2008) (Gary Eye and Steven Sandstrom) **(life, life)**;

3. *United States v. Sablan*, No. 00-CR-00531 (D. Colo. 2006) (William Concepcion Sablan and Rudy Cabrera Sablan) **(life, life)**;

4. *United States v. Caraballo*, No. 01-CR-01367 (E.D.N.Y. 2005) (Gilberto Caraballo and Martin Aguilar) **(life, life)**;

5. *United States v. Johnson*, No. 04-CR-00017 (E.D. La. 2005) (John Johnson, Joseph Smith, and Herbert Jones, Jr.); **(death, life, died before trial) (Johnson's death sentence was reversed due to government misconduct and he was ultimately sentenced to life; Smith received exemption from capital punishment due to intellectual disability);**

6. *United States v. Catalan-Roman*, No. 02-CR-00117 (D.P.R. 2005) (Lorenzo Vladimir Catalan-Roman and Hernardo Medina-Villegas) **(life, life)**;

7. *United States v. Payne*, No. 98-CR-00038 (M.D. Tenn. 2004) (Eben Payne, Jamal Shakir, and Donnell Young) **(charges dismissed, life, plea deal)**;

8. *United States v. Fulks*, No. 02-CR-00992 (D.S.C. 2004) (Chadrick E. Fulks and Branden L. Basham) **(death, death)**;

9. *United States v. Perez*, No. 02-CR-00007 (D. Conn. 2004) (Wilfredo Perez and Fausto Gonzalez) **(life, life)**;

10. *United States v. Ostrander*, No. 01-CR-00218 (W.D. Mich. 2003) (Robert Norman Ostrander and Michael Paul Ostrander) **(life, life)**;

11. *United States v. Taylor*, No. 01-cr-00073 (N.D. Ind. 2003) (Styles Taylor and Keon Thomas) **(life, life)**;

12. *United States v. Hyles*, No. 01-CR-00073 (E.D. Mo. 2003) (Tyrese D. Hyles and Amesheo D. Cannon) **(life, life)**;

13. *United States v. Henderson*, No. 00-CR-00260 (N.D. Tex. 2002) (Julius Omar Robinson and L.J. Britt) **(death, life)**;

14. *United States v. Cooper*, No. 01-CR-00008 (S.D. Miss. 2002) (Billy D. Cooper and James Edward Frye) **(life, life)**;

15. *United States v. Hage*, No. 98-CR-01023 (S.D.N.Y. 2001) (Mohamed Rashed Daoud Al-'Owhali and Khalfan Khamis Mohamed) **(life, life)**;

16. *United States v. Church*, No. 00-CR-00104 (W.D. Va. 2001) (Walter Lefight Church and Samuel Stephen Ealy). **(acquittal, life)**;

17. *United States v. Mikhel*, No. 02-CR-00220 (C.D. Cal. 2007) (Iouri Mikhel, Jurijus

Kadamovas and Petro Krylov) (death, death, life);

18. *United States v. Cooper*, No. 89-CR-580 (N.D. Ill. 1990) (Alex Cooper and Darnell (Anthony) Davis) (life, life);

19. *United States v. Hutching*, No. 1:92-032-S (E.D. Okl. 1992); (10th Cir. No. 93-7118) (James Norwood Hutching, Ramon Medina Molina, and John Javilo McCullah) (life, life, death);

20. *United States v. Holloway*, No. 4:94-CR-121-Y-1 (N.D. Tex. 1994) (Bruce Webster and Orlando C. Hall) (death, death);

21. *United States v. Nguyen*, 94-10129-01 (D. Kan. 1994) (Phouc H. Nguyen and Bountaem Chanthandara) (life, death); (death sentence vacated on appeal, Chanthandara sentenced to life);

22. *United States v. McVeigh*, No. M-95-98-H (W.D. Okl. 1995) on change of venue to (D. Col. No. 96-CR-68-M) (Timothy James McVeigh and Terry Lynn Nichols) (death, life);

23. *United States v. Johnson*, No. 96 CR 379 (N.D. Ill. 1996) (Darryl Alamont Johnson and Quan Ray) (death, life); (death sentence vacated in 2255, defendant sentenced to life)

24. *United States v. Holder*, No. 4:97-CR-0141 ERW (TCM)) (E.D. Mo. 1997) (Billie Jerome Allen and Norris G. Holder) (death, death);

25. *United States v. Kehoe*, No. LR-CR-97-243 (E.D. Ark. 1997) (Daniel Lee and Chevy Kehoe) (death, life);

26. *United States v. Stewart*, No. 4:99-CR-11- M (W.D. Ky. 1999) (Billy Joe Lyon and Charles Stewart) (life, life (death penalty struck prior to trial for Stewart);

27. *United States v. Cruz*, No. 8:05-CR-00393-DKCALL (D. Md. 2005) (Antonio Argueta and Juan Carlos Moreira) (life, life);

28. *United States v. Aquart*, 3:06-CR-160 (PCD) (D. Ct. 2006) (Azibo Aquart and Azikiwe Aquart) (death, life).